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Constitutionalizing Class Certification

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I. INTRODUCTION

Class action litigation is in a period of transition. Many scholars, including myself, have observed the slow demise of class actions in federal court in the wake of the Class Action Fairness Act of 2005 (CAFA),[1] and the Supreme Court decisions that followed. Indeed, some scholars have even begun imagining the shape of mass tort litigation in a "post-class action era."[2] However, the end of the Supreme Court's most recent term brought a chorus of relief from the plaintiffs' bar. This was a Supreme Court term that some had once feared would hasten the end of federal class actions, but the term concluded without any tectonic shifts in the procedural landscape of aggregate litigation.[3] The respite taken by the Supreme Court in reshaping class action doctrine is not a signal of the doctrine's stability, however. The instability of the class action landscape seems to have instead merely relocated to lower courts for now.[4]

While the Roberts Court created increasingly insurmountable barriers to certification of nationwide classes in federal court,[5] mass tort litigation did not simply vanish into thin air. When federal courts (mostly) closed their doors to nationwide class actions, some of the disputes shifted into federal multidistrict litigation composed of many similar individual suits consolidated for pretrial proceedings.[6] Others fragmented into smaller class actions, some of which stayed in state

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1. 28 U.S.C. §§ 1332(d), 1453, 1711–1715. For examples of commentary discussing the demise, *see, e.g.*, Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v Concepcion*, 79 U. CHI. L. REV. 623, 658 (2012) (describing class actions as being "on the ropes"); Jeremy Hays, *The Quasi-Class Action Model for Limiting Attorneys' Fees in Multidistrict Litigation*, 67 N.Y.U. ANN. SURV. AM. L. 589, 601 (2012) (discussing the waning utility of class actions under Rule 23 and the imperfect nature of MDL as a replacement); Deborah R. Hensler, *Goldilocks and the Class Action*, 126 HARV. L. REV. F. 56, 56 (2012) ("Mass tort class actions have virtually disappeared . . . ."); Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L. J. 1339, 1346 & n.37.
2. *See, e.g.*, Mark Moller, *The New Class Action Federalism*, 48 AKRON L. REV. 861, 868 (2015) (discussing a term coined by Professor Glover); J. Maria Glover, *Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-Removable State Actions in Multi-District Litigation*, 5 J. TORT L. 1, 7 (2014).
3. *See* Perry Cooper, *Class Actions at SCOTUS: The Term That Wasn't*, BLOOMBERG BNA (July 13, 2016), https://bol.bna.com/class-actions-at-scotus-the-term-that-wasnt/ [https://perma.unl.edu/PAB3-62T9].
4. *Id.* (observing that while the Supreme Court awaits a ninth justice to replace Justice Scalia, "[I]t appears that the circuit courts are the effective courts of last resort for federal issues involving class [actions]").
5. *See, e.g.*, Moller, *supra* note 2, at 862.
6. *See* 28 U.S.C. § 1407.

courts.[7] Mark Moller has suggested this unintended result of the Supreme Court's contraction of nationwide class actions in the post-CAFA era created a kind of "accidental federalism" through the fragmentation and dispersal of mass tort litigation.[8]

This Article's focus is on a different kind of federalism in mass torts: the integrity of states as independent systems of adjudication for mass tort litigation. Specifically, it identifies the enormous pressure being placed upon this independence in the fragmented, dispersed pieces of mass tort litigation that happen to land in state court systems in the post-CAFA era. This form of federalism is not accidental or "happenstantial."[9] Rather, it is an essential and fundamental structural feature of our federal constitutional system. The independence of state courts as separate systems of civil adjudication is under pressure from a wave of arguments from defendants seeking to nationalize class action procedure through an aggressive reworking of constitutional due process doctrine that would wipe away state variations in class certification procedures.

A little-noticed battle for the future of complex litigation appears to be underway in state supreme courts. The relocation of class action's doctrinal battles to state courts is astonishing, as not long ago, state courts seemed to fade away in importance in complex litigation because of CAFA's reforms: CAFA was designed to facilitate the removal of many class actions from state courts to federal courts, causing the number of class actions in state courts to plummet.[10] Once in federal court, a wave of Supreme Court decisions then raised the bar to certifying classes in most mass tort cases.[11] Since CAFA facilitated re-

7. *See* Moller, *supra* note 2, at 865–66.

8. *Id.* at 867.

9. *Cf. id.* at 882.

10. *See id.* at 863, 866 (observing that CAFA facilitates removal by expanding diversity to encompass *minimal* diversity between any named plaintiff or putative class member and any defendant); Laura J. Hines, *Mirroring or Muscling: An Examination of State Class Action Appellate Rulemaking*, 58 U. KAN. L. REV. 1027, 1038 (2010) ("[S]tate class actions post-CAFA have undoubtedly declined . . . ."); Steven S. Gensler, *The Other Side of the CAFA Effect: An Empirical Analysis of Class Action Activity in the Oklahoma State Courts*, 58 U. KAN. L. REV. 809, 825–27 (2010) (noting a significant reduction in class action filings in Oklahoma State courts post-CAFA); Emery G. Lee III & Thomas Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1762 (2008) ("The findings . . . provide strong support for the conclusion that CAFA has caused the number of diversity class actions filed in and removed to the federal courts to increase appreciably."); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 745 (2013) ("CAFA has . . . had an enormous impact in shifting most class actions to federal court.").

11. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011); Comcast v. Behrend, 133 S. Ct. 1426 (2013). The wave of precedent stretches back to an era preceding CAFA, to *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz*

moval of more suits into federal court, complex litigation scholars naturally focused on the rapid reshaping of the class action landscape by those federal courts.[12] The resulting post-CAFA decline in the utility of federal class actions as a means of resolving complex mass tort disputes has been well captured by academic commentators.[13] CAFA, combined with the Supreme Court's tightening of the understanding of the federal procedures for certification, seemed to have narrowed the space in which class actions could operate. This has been the conventional narrative for quite some time, but this narrative captures only part of the picture of what is transpiring.

This conventional post-CAFA mass torts narrative misses the development of the movement in state supreme courts to constitutionalize class certification. State class actions did not entirely vanish. Despite CAFA's robust sweep of cases into federal court, its plain terms contemplated space for at least *some* class actions that would continue to be decided by state courts, although that space would be smaller.[14] Within that small space in state courts, monumentally important changes are occurring in the kind of arguments being used to oppose class certification.

The state-by-state battle over class certification procedure is still in its early stages and has largely been overlooked by scholars, who have understandably fixed their gaze on developments in federal

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v. Fibreboard Corp., 527 U.S. 815 (1999), which limited federal courts' ability to certify nationwide classes to facilitate settlements of mass tort cases. *See* Thomas, *supra* note 1, at 1346 & n.37; Anne Bloom, *From Justice to Global Peace: A (Brief) Genealogy of the Class Action Crisis*, 39 LOY. L.A. L. REV. 719, 747 (2006); Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 208.

12. *See, e.g.*, Moller, *supra* note 2, 864 (reviewing post-CAFA scholarship).

13. *See, e.g.*, Thomas, *supra* note 2, 1346 & n.37 (summarizing academic commentary); Sergio Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1063 (2012) ("[A]lmost all courts and scholars disfavor the use of class actions in mass tort litigation because the class action device infringes upon each plaintiff's autonomy over the tort claim.").

14. *See* 28 U.S.C. § 1332(d)(2). For example, class actions with fewer than 100 people, or with an aggregate value under $5 million, or lacking minimal diversity were excluded from its jurisdictional ambit. *See* 28 U.S.C. § 1332(d)(4)(A). Congress also included a "local controversy exception," exempting from removal classes where two-thirds of the class-members are from the forum state, at least one defendant is also a member of the forum state, the defendant's conduct in that state formed a significant basis for the claim, and the class is seeking significant relief from that defendant for injuries that occurred in the state. *See* 28 U.S.C. § 1332(d)(4)(B). Congress also created both a mandatory and permissive "home state" abstention exception, depriving federal courts entirely of jurisdiction, where two-thirds of the proposed class members are from the forum state, and the primary defendants are also citizens of the state, and allowing permissive abstention when more than one-third but less than two-thirds of the class members are from the forum state (and again, the primary defendants are too). 28 U.S.C. § 1332(d)(3).

courts in the post-CAFA era. The conventional narrative focused academic attention on the one-two punch of Congress (enacting CAFA to facilitate more federal removal) and the Supreme Court (issuing a series of important decisions interpreting Federal Rule of Civil Procedure 23 to make class actions less likely to survive).[15] This narrative has helped to mask a seismic shift that is occurring in the manner in which defendants present arguments about certification in state courts, and this shift has profound implications for federal courts, too.

While a long line of Supreme Court decisions has focused on interpreting Federal Rule 23, state courts are not constrained to follow this precedent in their own certification of class actions filed in state court. Instead, defendants are often focusing state certification arguments on the U.S. Constitution. This tactic seeks to limit state procedural choices in certifying class actions, constraining states through an expansive interpretation of the civil defendants' due process rights. The tactic aims to constitutionalize the class certification process.

Defendants have attacked certification of class actions in state courts with an array of constitutional arguments about the process for certification. These arguments have been percolating through state courts (and sometimes even lower federal courts), without having yet reached the U.S. Supreme Court. Despite, or maybe because of, the Supreme Court's silence on the matter, they are becoming an increasingly important feature of the class certification landscape.

Many of the constitutional arguments against class certification are already well worn. Almost as long as there have been class actions, defendants have complained that curtailing their right to bring individual defenses would violate due process.[16] Arguments along these lines have long been asserted sporadically in lower courts, sometimes for decades; the arguments have become mainstream, stock arguments—and they now seem to be gaining some traction in some state courts and lower federal courts.

The academic commentary thus far has generally treated the varying constitutional arguments raised by class action defendants in different contexts in state and federal courts as dwelling in distinct

15. *See, e.g.*, Moller, *supra* note 2, at 867; Glover, *supra* note 2, at 8–10.

16. *See, e.g.*, W. Elec. Co. v. Stern, 544 F.2d 1196, 1199 (3d Cir. 1976) (discussing the defendant's constitutional "right to present a full defense"); Joseph v. Gen. Motors Corp. 109 F.R.D. 635 (D. Colo. 1986) (rejecting the defendant's "contention that certification of a class action in this case would violate its right to due process of law under the Fourteenth Amendment by preventing it from asserting individual defenses"); *In re* Cadillac V8-6-4 Class Action, 461 A.2d 736 (N.J. 1983) (rejecting the defendant's "contention that certification of a class action would violate its right to due process of law under the Fourteenth Amendment by preventing it from asserting individual defenses, such as the treatment of the vehicles by each plaintiff and actual reliance on [the defendant]'s representations").

doctrinal silos. For example, arguments objecting to certifying a class seeking punitive damages have been analyzed with reference to the specialized constitutional doctrine developed for punitive damages in individual litigation.[17] Arguments about individual proof and statistical modeling, by contrast, have been treated as having a different doctrinal pedigree, closely linked to procedural due process.[18]

This Article offers a fresh perspective by weaving together different threads of constitutional arguments related to class certification to demonstrate their common function in the class certification process. It takes these different doctrinal species of constitutional objections to certification and shows that they have a common purpose in the process. Each of these species attempts to shift certification from a rule-based decision to a constitutional one based on arguments about class members lacking sufficient commonality to allow for class-wide adjudication of defenses. In other words, it constitutionalizes the commonality inquiry. Connecting these different constitutional objections to class certification reveals that collectively they aim to create one homogeneous certification scheme in state and federal court, grounded in a new, defendant-focused interpretation of procedural due process.

This Article concludes that this defendant-centric expansion of procedural due process conflicts with the flexible, pragmatic view at the heart of the Supreme Court's modern procedural due process jurisprudence, and more importantly, with the fundamental values of federalism at the heart of our civil justice system. It is a direct assault on the independence of state courts as separate, distinct systems.

Constitutionalizing class certification is a powerful reform strategy, in that it would impact not only class actions litigated in federal court, but also nonremovable state class actions being litigated under state rules that differ from Federal Rule of Civil Procedure 23. It is a challenge to the rulemaking processes of all fifty states, as well as the Federal Rules.

This Article has two objectives. It seeks first to create a typology of these emerging constitutional challenges to certification and contextu-

17. *See, e.g.*, Sheila B. Scheuerman, *Two Worlds Collide: How the Supreme Court's Recent Punitive Damages Decisions Affect Class Actions*, 60 BAYLOR L. REV. 880, 905–08 (2008) (arguing cases reviewing punitive damages in individual litigation should apply to class certification); James M. Underwood, *Road to Nowhere or Jurisprudential U-Turn? The Intersection of Punitive Damage Class Actions and the Due Process Clause*, 66 WASH. & LEE L. REV. 763, 765 (2009) (evaluating the relationship between due process limits on punitive damages and class certification); Linda S. Mullenix, *Nine Lives: The Punitive Damages Class*, 58 U. KAN. L. REV. 845, 876 (2010) (discussing the implications of the Supreme Court's punitive damages constitutional doctrine for punitive damages classes); *see also* Katherine E. Lamm, *Work in Progress: Civil Rights Class Actions after* Wal-Mart v. Dukes, 50 HARV. C.R.-C.L. L. REV. 153, 173–74 (2015) (discussing commonality issues related to damages in class certification).

18. *See supra* note 16.

alize them. It argues that these challenges share fundamental similarities in their approach to the class certification process. While due process in class actions has historically focused on the rights of absent members of the *plaintiff* class, this new species of argument attempts to reframe the constitutional inquiry by focusing on the *defendant's* procedural rights. Importantly, the goal of this Article is not to resolve all the debates within all the doctrines in these varying constitutional arguments. Its goal is more modestly to show that they are connected in their functioning within the class certification process, and that connection reveals the strategic purpose and systemic risks.

The collection of constitutional arguments against class certification generally lacks a coherent constitutional foundation at present and challenges fundamental principles of federalism with regard to the separateness of state judicial procedures. Part II introduces the emerging constitutional shift in class certification in lower courts. Part III then turns to the historical understanding of due process in the context of class actions and the scholarly literature on due process in complex litigation. Part IV then reconstructs federalism as a value in the functioning of state courts as independent adjudicatory systems, connecting it to the class certification process. This Article ultimately concludes that the constitutionalization of class certification undermines important federalism values by seeking a national, uniform class certification procedure.

II. THE CONSTITUTIONAL SHIFT IN CLASS CERTIFICATION

There are several different threads of constitutional argumentation that have crystallized in the arguments of defendants opposing class certification. One of them is unique to federal court, focusing on the requirements of Article III of the United States Constitution. This thread, though, has a little-noticed connection to state courts through state standing doctrines. The other threads of argumentation are different, focusing on how one proves liability and damages in a class action—by attacking the commonality of the issues of facts and law that hold a class together in a class action. This latter species emphasizes the Due Process Clause of the Fifth and Fourteenth amendments, with equal relevance in state and federal court. If successful, these arguments taken together have the potential to be near-universal "class action killers." However, when deconstructed, they are fundamentally part of a process to constitutionalize the procedure to certify a class in *any* court, state or federal.

A. BP's Gulf Oil Spill Muddies Article III's Limits on Class Standing in Federal Court

The constitutional shift in class certification gathered momentum in the late 1990s, but it seems to have recently progressed at a furious

pace. In *Amchem Products, Inc. v. Windsor*, the Supreme Court announced in dicta that class certification under Federal Rule of Civil Procedure 23 "must be interpreted in keeping with Article III constraints."[19] This simple assertion has inspired a new line of argumentation in federal class actions, where class members may be damaged unevenly, with some absent class members having little or no harm traceable to the defendant.

Recently, the *Deepwater Horizon* litigation in the Fifth Circuit put this argument on vivid display. The litigation stemmed from the British Petroleum (BP) oil spill in 2010, which contaminated the Gulf of Mexico with millions of barrels of oil.[20] BP argued that Article III has an implicit requirement of causation (i.e., that damages claimed by class members were specifically caused by the alleged class conduct). BP specifically attacked the constitutionality of settlement payments to class members who could not present individualized proof that BP's conduct, with regard to the oil spill, caused these claimants' economic damages. BP's argument connected the *Amchem* dicta with the Court's doctrine of constitutional standing under Article III.[21]

The Fifth Circuit allowed the class to be certified, even though it allegedly included uninjured plaintiffs.[22] BP had agreed to a proposed settlement in April 2012 with a class of individuals and businesses claiming to be damaged by the spill.[23] Instead of ending the litigation, the settlement was the start of a new, complex dispute about the interpretation of the settlement's terms, who could submit claims under it, and whether the district court's interpretation of it violated BP's due process rights.

BP's position was that the interpretation of the settlement claims administrator (and district court) regarding the proof needed to file a claim wrongly permitted "class members" who suffered no injury whatsoever from the spill to submit claims for payment.[24] According to the defendant, this interpretation had the effect of including uninjured parties within the class.[25] BP claimed this violated Article III's standing requirement.

After a long and winding procedural history with multiple appeals to different panels of the Fifth Circuit and multiple remands back to the trial court, the Fifth Circuit eventually approved class certifica-

19. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997).

20. *In re* Deepwater Horizon, 739 F.3d 790, 795 (5th Cir. 2014), *cert denied sub nom.* BP Expl. & Prod. Inc. v. Lake Eugenie Land & Dev., 135 S. Ct. 754 (2014).

21. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Lewis v. Casey, 518 U.S. 343 (1996).

22. *In re Deepwater Horizon*, 739 F.3d at 795.

23. *Id.* at 986.

24. *Id.* at 796–98.

25. *Id.* at 796–98.

tion, rejecting BP's constitutional challenges.[26] In the first of a series of appellate decisions, the circuit found that the named plaintiffs all had standing under Article III because these class representatives' *own* injuries were caused by the oil spill.[27] Further, even if one were to consider the absent class members, the court found that the class definition also covered them by requiring all claimants to have "experienced '[l]oss of income, earnings or profits . . . as a result of the DEEPWATER HORIZON INCIDENT.'"[28] Importantly, the court concluded the Constitution did not require a strict evidentiary standard that might ferret out parties receiving unwarranted payments.[29] BP thus had no right to proof of injury from all of the claimants once the class was certified for settlement.

A second appellate decision from a different Fifth Circuit panel then approved the district court's interpretation of the settlement agreement.[30] The Fifth Circuit interpreted the settlement agreement to allow claimants to certify, under penalty of perjury, that their injuries had been caused by the Deepwater Horizon spill in lieu of submitting proof of causation to support their claim.[31] The Fifth Circuit thus understood the settlement to be an express agreement by BP to accept the claimants' certification statements as sufficient proof that the injuries were traceable to the disaster.[32] The court found this to be a rational business choice in light of "the practical problem [that] mass processing of claims such as these presents."[33]

The majority's decision in this case was groundbreaking in that it created space for the absent class members' standing to derive from the settlement agreement itself in a class action certified for settlement. In a spirited dissent, Judge Clement argued that a settlement class action, where "the certification stage and the proof stage have been combined," should not be designed in a way that would allow recovery by claimants whose injuries have nothing to do with the defendant's conduct.[34]

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26. *Id.* at 795, 798.
27. *Id.* at 802.
28. *Id.* (alteration in original) (quoting *In re* Oil Spill by Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2012, 910 F. Supp. 2d 891, 967 (E.D. La. 2012) (appendix), *aff'd sub nom. In re* Deepwater Horizon, 739 F. 3d 790 (5th Cir. 2014)) (internal quotation marks omitted).
29. *Id.*
30. *In re* Deepwater Horizon, 744 F.3d 370, 374 (5th Cir. 2014), *cert. denied sub nom.* BP Expl. & Prod. Inc. v. Lake Eugenie Land & Dev., 135 S. Ct. 754 (2014).
31. *Id.* at 376.
32. *Id.* at 377 ("It was a contractual concession by BP to limit the issue of factual causation in the processing of claims.").
33. *Id.*
34. *Id.* at 383, 384 (Clement, J, dissenting) ("But these plaintiffs have no injury traceable to BP's actions, and would not have standing to maintain a suit individually . . . .").

BP filed a petition for certiorari, supported by an army of amici.[35] The Supreme Court declined the invitation to take up the dispute.[36] The case was likely too complicated a vehicle to present the issue, given the complexity of the settlement agreement and its procedural posture.

Although the holding with regard to standing deriving from the settlement terms was novel, the Fifth Circuit's flexible approach in the *In re Deepwater Horizon* case aligned it with a plurality of five circuits permitting a class action to be certified even though all of the class members cannot show individual proof of satisfying Article III's standing requirement (e.g., either the named class representatives or most of the class members meet Article III standing requirements). In other words, these circuits do not require every member of the class to be able to prove standing. For example, the First Circuit allows a "de minimis" number of uninjured members in a certified class.[37] Like the First Circuit, the Seventh Circuit similarly uses a flexible standard that seeks to avoid *too many* uninjured class members.[38] The Third Circuit requires only that the named class representatives show Article III standing and does not require absent class members to

35. Brief Amicus Curiae of the Federation of German Industries, Confederation of British Industry, American Chamber of Commerce in Germany, and British American Business in Support of Petitioners, BP Expl. & Prod. Inc. v. Lake Eugenie Land & Dev., Inc., 135 S. Ct. 754 (2014) (No. 14-123), 2014 WL 4380097; Brief of Her Britannic Majesty's Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners, *BP Expl. & Prod. Inc.*, 135 S. Ct. 754 (No. 14-123), 2014 WL 4404764; Brief of Kenneth R. Feinberg, Special Master of the Federal September 11th Victim Compensation Fund of 2001 and Administrator of the Gulf Coast Claims Facility, as Amicus Curiae in Support of Petitioners, *BP Expl. & Prod. Inc.*, 135 S. Ct. 754 (No. 14-123), 2014 WL 4404763; Brief of Washington Legal Foundation as Amicus Curiae in Support of Petitioners, *BP Expl. & Prod. Inc.*, 135 S. Ct. 754 (No. 14-123), 2014 WL 4380922; Brief for Amici Curiae the Chamber of Commerce of the United States of America, The United States Hispanic Chamber of Commerce, The National Association of Manufacturers, The American Tort Reform Association, and The American Petroleum Institute in Support of Petitioners, *BP Expl. & Prod. Inc.*, 135 S. Ct. 754 (No. 14-123), 2014 WL 4380921.

36. *BP Expl. & Prod. Inc.*, 135 S. Ct. 754.

37. *In re* Nexium Antitrust Litig., 777 F.3d 9, 32 (1st Cir. 2015).

38. Messner v. Northshore Univ. Health System, 669 F.3d 802, 825 (7th Cir. 2012) (holding that determining how many uninjured class members is too many is "a matter of degree, and will turn on the facts as they appear from case to case"); *see also* Kohen v. Pac. Inv. Mgmt. Co. LLC, 571 F.3d 672, 677 (7th Cir. 2009) (reasoning that "a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant . . .").

meet that standard.[39] The Ninth Circuit is in accord with the Third Circuit, focusing attention on the class representatives.[40]

By contrast, the Second Circuit requires that a class be defined so that "*anyone* within it would have standing," though it has no requirement that each member of the class submit evidence of personal standing.[41] The Eighth Circuit has drawn a bright line, rejecting certification if a class contains uninjured members.[42]

So far, the Supreme Court has declined to step into this circuit split, leaving the lower courts to work through the defendants' arguments on Article III class standing without definitive guidance. It appeared to grant certiorari on that question in its last term, in *Tyson Foods, Inc. v. Bouaphakeo*.[43] However, the defendant-petitioner abandoned that issue in its merits brief,[44] removing it from the Court's consideration. In *Spokeo, Inc. v. Robins*, another case decided in the Court's last term, the Court clarified that a *class representative* must have standing in the form of a particularized and concrete injury.[45] The decision offers no guidance on the situation faced by BP, where it was the *absent class members* who allegedly sustained no injury.[46] The relationship between absent class members and Article III standing doctrine remains open in the Supreme Court.

The scope of this Article III argument, though, is necessarily limited to proceedings in federal court—and federal courts have generally treated this as a standing problem, not a due process problem. How-

39. Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 362 (3d Cir. 2015) ("[T]he 'cases or controversies' requirement is satisfied so long as a class representative has standing, whether in the context of a settlement or litigation class. This rule is compelled by *In re Prudential* and buttressed by a historical review of representative actions.").

40. Mazza v. Am. Honda Motor Co., 666 F.3d 581 (9th Cir. 2012); Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1021 (9th Cir. 2011) ("[O]ur law keys on the representative party, not all of the class members, and has done so for many years.").

41. Denny v. Deutsche Bank AG, 443 F.3d 253, 263–64 (2d Cir. 2006) (emphasis added).

42. Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773, 778 (8th Cir. 2013) ("In order for a class to be certified, each member must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision."); *see also* Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 591 (8th Cir. 2009) (citing the *Lujan* injury requirement intrinsic to the "irreducible constitutional minimum of standing").

43. 136 S. Ct. 1036, 1048 (2016) ("In its petition for certiorari petitioner framed its second question presented as whether a class may be certified if it contains 'members who were not injured and have no legal right to any damages.'").

44. *Id.* ("[Petitioner] now concedes that the fact that federal courts lack authority to compensate persons who cannot prove injury does not mean that a class action (or collective action) can never be certified in the absence of proof that all class members were injured.") (internal quotations omitted).

45. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 n.6 (2016).

46. *See, e.g.*, Mark A. Perry, Spokeo *and Absent Class Member Standing*, 38 Class Action Litig. Rep. (BNA) 841, 17 CLASS 841 (BL) (Aug. 12, 2016).

ever, many states have their own parallel standing doctrine—even though they are not constrained by Article III.[47] F. Andrew Hessick's survey of variations in state standing doctrines reveals that several states have an injury-in-fact test parallel to federal standing doctrine.[48] Others use the injury-in-fact test as a default, but subject it to exceptions.[49] Still others have developed a standing doctrine with a looser test looking for an alleged violation of the plaintiff's legal rights.[50] For states using some version of the injury-in-fact test inspired by federal doctrine, any federal developments regarding standing have the potential to spill over into state systems through federal opinions treated as persuasive authority, even if not binding on the state courts. Moreover, the causation component in the standing arguments (i.e., that a concrete, particularized injury was caused by the defendant's conduct) is easily labeled as a form of due process in the briefing. It would thus be a mistake to view the controversy over absent class members' injuries to have no implications for state courts.

The Article III argument about uninjured class members is also fundamentally an argument about whether the class is sufficiently cohesive in the sense of having enough in common to bind the class together. The argument presents the putative class as including members who are very different from one another: named class members who can offer proof of their injury and its causation, and absent class members who lack such proof. The differences between the allegedly uninjured class members and the class representatives are elevated in this argument to a constitutional distinction depriving some

47. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1838 (2001) (noting that many state courts adhere to the model for standing found in Article III); *accord id.* at 1854 ("The source of standing rules varies from state to state, as does their content."); F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 NW. U. L. REV. 57, 66–68 (2014) (discussing the various approaches that the states take in regards to the standing requirement); *see also, e.g.*, Chiatello v. City of San Francisco, 117 Cal. Rptr. 3d 169, 176 (Cal. Ct. App. 2010) ("Standing is a jurisdictional issue that . . . must be established in some appropriate manner."); ACLU of N.M. v. City of Albuquerque, 188 P.3d 1222, 1227 (N.M. 2008) ("While we recognize that standing in our state courts does not have the constitutional dimensions that are present in federal court, New Mexico's standing jurisprudence indicates that our state courts have long been guided by the traditional federal standing analysis."); Soc'y of Plastics Indus. v. County of Suffolk, 573 N.E.2d 1034, 1040 (N.Y. 1991) ("The existence of an injury in fact—an actual legal stake in the matter being adjudicated—ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute 'in a form traditionally capable of judicial resolution.'").

48. Hessick, *supra* note 47, at 66 (identifying Rhode Island, Wyoming, Indiana, and Arizona as examples).

49. *Id.* at 67 & n.65 (identifying Michigan, Minnesota, Mississippi, South Carolina, Texas, and Virginia as examples).

50. *Id.* at 66–67 (identifying California, Louisiana, and New Hampshire as examples).

class members of standing. The lack of cohesiveness in the class, though, is key: this argument presumes there is a constitutional floor in class cohesion, and once one passes that floor, no class may be certified. The defendants usually argue, as BP did, that *any* class member unable to show causation is a constitutional defect. This illustrates that the goal of this argument is to litigate causation individually, class member by class member. As we shall see in section II.B, the same focus on cohesiveness underlies another species of argument under the Due Process Clause.

B. Defendant Due Process Rights in Class Actions in State Courts

1. Montana's Example: Class-Wide Punitive Damages

Meanwhile, a different, more wide-reaching species of constitutional argument appeared recently in a Montana Supreme Court case.[51] The case raised a trio of due process arguments in the certification of a class under state class action rules. The most important of these was an argument that the U.S. Constitution forbids certifying class claims if any individual defenses would be eliminated from consideration in the litigation. The defendant sought to establish that due process barred the certification of such class actions in state courts (potentially barring *all* punitive damages claims from class actions as a constitutional matter).[52]

In *Jacobsen v. Allstate Insurance Co.*,[53] the class challenged the defendant's insurance claim settlement practices in the state of Montana. The case was certified as a class action under the Montana's own class action rule, Montana Rule of Civil Procedure 23. The class argued that Allstate's claims handling policy intentionally misled claimants by suggesting they would get more money without an attorney, whereas claimants represented by counsel actually received significantly more compensation for their claims.[54] The class further claimed the claims handling procedures resulted in unfair settlements.[55] The class definition included "all unrepresented individuals who had either third-party claims or first-party claims" under Allstate's Claim Core Process Redesign policy, implemented in the 1990s

51. *See* Allstate Ins. Co. v. Jacobsen, 310 P.3d 452 (Mont. 2013), *cert. denied*, 134 S. Ct. 2135 (2014).

52. *See* Brief of Amicus Curiae DRI—The Voice of the Defense Bar in Support of Allstate Insurance Company, *Jacobsen*, 310 P.3d 452 (No. 13–916), 2014 WL 847543.

53. 310 P.3d 452.

54. *Jacobsen*, 310 P.3d at 456.

55. *Id.*

to reduce total payouts, in part, by persuading claimants not to hire legal counsel.[56]

The state trial court certified the class after narrowing the class definition to include only unrepresented claimants who filed first-party or third-party claims with Allstate in motor-vehicle accidents in excess of the policy deductible, with claims adjusted in Montana under the specific Allstate procedure adopted in the mid-1990s.[57] Although Montana's Rule 23 tracks Federal Rule of Civil Procedure 23, the state court did not view itself as bound by federal interpretations of Federal Rule of Civil Procedure 23, except as persuasive authority. In other words, the state court read the Supreme Court's opinion restricting class certification in *Wal-Mart Stores v. Dukes*[58] as a case limited to rule interpretation. Without a constitutional basis, *Dukes*'s interpretation of Rule 23 could not bind the state court.

The Montana Supreme Court approached class certification under the state rule the same way a federal court would: starting with Rule 23(a)'s four requirements (numerosity, commonality, typicality, and adequacy).[59] There was no dispute that the six hundred members of the class were sufficiently numerous.[60] The court also found little reason to doubt typicality or adequacy.[61] The dispute turned on state's own requirement of "commonality" (i.e., the need for "questions of law or fact common to the class").[62] The state requirement for commonality uses language that exactly tracks Federal Rule 23.[63]

Although Montana had a history of relying on federal precedent to interpret the state's own version of Rule 23,[64] the state court declined to decide whether to follow the U.S. Supreme Court's interpretation of that rule in *Dukes*. It distinguished the Allstate dispute on its facts: unlike Wal-Mart in the *Dukes* case, here Allstate had a company-wide policy guiding its claim settlement, and that policy that was the basis for each class member's claim, making this a relatively straightforward commonality analysis compared to *Dukes* (where there was no company-wide policy connecting all the class members' claims).[65]

However, once the court turned its attention to Rule 23(b), the defendant's constitutional arguments gained some traction. That part of the rule in Montana defines allowable types of class actions. The class

56. *Id.* at 456, 458.
57. *Id.* at 457.
58. 564 U.S. 338 (2011)
59. *See* MONT. CODE. ANN. § 25-20-23 (2015).
60. *Jacobsen*, 310 P.3d at 460.
61. *Id.* at 470–71.
62. *See* MONT. CODE. ANN. § 25-20-23(a)(2) (2015).
63. *See* FED. R. CIV. P. 23(a)(2).
64. *Jacobsen*, 310 P.3d at 460–61 (citing Chipman v. Nw. Healthcare Corp., 288 P.3d 193, 208 (Mont. 2012)).
65. *Id.* at 462–63.

had been certified under Montana's version of Rule 23(b)(2), which mirrors Federal Rule of Civil Procedure 23(b)(2) in permitting classes seeking injunctive relief where relief is proper as to the class as a whole.[66] The state trial court had certified four forms of relief: (1) declaratory relief as to the unlawfulness of the claims handling procedure; (2) injunctive relief requiring Allstate to re-adjust class members' claims; (3) class-wide punitive damages upon a finding of malice; and (4) attorney fees paid to a common fund.[67]

The state supreme court reversed the certification of class-wide punitive damages, finding due process implied a right to raise individualized defenses, even though it had already found Allstate subjected the entire class to the same class-wide policy.[68] The state supreme court's solution was to resolve the common issue of the company-wide claims procedure's lawfulness in one class action, after which individual class members could pursue individual compensatory and punitive damages in separate damages trials. The class action would thus survive, but it would decide only one aspect of each class member's claim and require subsequent, individual litigation over damages (including punitive damages).[69]

Allstate sought certiorari from the U.S. Supreme Court.[70] Allstate's petition raised due process issues related to the state's certification of the class, including a constitutional right present of individual defenses.[71] The petition was supported by six different amicus curiae briefs.[72] Despite the strong business community sup-

66. *See* MONT. CODE. ANN. § 25-20-23(b)(2) (2015) (defining an allowable class to include situations where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole"); *Jacobsen*, 310 P.3d at 471–72.

67. *Jacobsen*, 310 P.3d. at 471.

68. *Id.* at 475 ("Allstate should be able to establish defenses to individual claims to ensure that punitive damages are not awarded to claimants that were not actually damaged by the adjustment of their claims under the [claims handling procedure].").

69. *Id.* at 464–66.

70. *See* Petition for a Writ of Certiorari, *Jacobsen*, 310 P.3d 452 (No. 13-916), 2014 WL 342624. Its certiorari petition was authored by the law firm that had won *Wal-Mart Stores v. Dukes* several years earlier. *Id.* at i. (showing brief submitted by Gibson, Dunn & Crutcher). The same law firm also happened to be BP's appellate counsel in the unsuccessful certiorari petition in the *Deepwater Horizon* litigation. *See* Petition for a Writ of Certiorari, BP Expl. & Prod. Inc. v. Lake Eugenie Land & Dev., Inc., 135 S. Ct. 754 (2014) (No. 14-123), 2014 WL 3834540.

71. *See* Petition for a Writ of Certiorari, *Jacobsen*, 310 P.3d 452 (No. 13-916), 2014 WL 342624, at *i.

72. *See* Brief of the Cato Institute and Center for Class Action Fairness as Amici Curiae in Support of Petitioner, *Jacobsen*, 310 P.3d 452 (No. 13-916), 2014 WL 847538; Brief of Amicus Curiae DRI—The Voice of the Defense Bar in Support of Allstate Insurance Company, *Jacobsen*, 310 P.3d 452 (No. 13-916), 2014 WL 847543, at *4 (citing Justice Scalia's stay order in Philip Morris USA, Inc. v.

port for granting certiorari, the Court declined to take up the due process arguments and refused to review the case.[73]

2. *Pennsylvania's Example:* Wal-Mart *Redux*

In Pennsylvania, the state took a different approach to due process arguments recently packaged as a challenge to "trial by formula" in class actions. After the Supreme Court's decision in *Wal-Mart Stores v. Dukes*[74] seemingly doomed nationwide class actions in employment litigation, the employee claims against Wal-Mart splintered. Wal-Mart employees around the country filed several smaller class actions against the company alleging various employment violations. In other words, the disputes fractured into many regional cases after the nationwide class failed before the Supreme Court. One of those "son of *Dukes*" actions was *Braun v. Wal-Mart Stores*, a case filed in Pennsylvania state court on behalf of a class of Wal-Mart employees alleging wage and hour violations that ultimately resulted in a judgment of over $187.6 million.[75]

The employees claimed that Wal-Mart failed to compensate them for rest breaks and off-the-clock work as required by Wal-Mart's own policies and state law.[76] The state court certified a class in 2005 consisting of "all current and former hourly employees of Wal-Mart in the Commonwealth of Pennsylvania from March 19, 1998 to the present."[77] After a thirty-two-day jury trial, in which Wal-Mart called eighteen fact witnesses and three experts,[78] Wal-Mart prevailed on claims related to meal periods but lost on rest breaks and off-the-clock work.[79] The jury awarded $2.5 million for the rest break claims alone.

Scott, 131 S. Ct. 1 (2010) (Scalia, J., in chambers)); Brief for the Chamber of Commerce of the United States of America, the American Tort Reform Association, the National Association of Mutual Insurance Companies, and the Property Casualty Insurers Association of America as Amici Curiae Supporting Petitioner, *Jacobsen*, 310 P.3d 452 (No. 13-916), 2014 WL 847542; Brief of Washington Legal Foundation and International Association of Defense Counsel as Amici Curiae in Support of Petitioner, *Jacobsen*, 310 P.3d 452 (No. 13-916), 2014 WL 847540; Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Petitioner, *Jacobsen*, 310 P.3d 452 (No. 13-916), 2014 WL 847539; Brief of Allergan, Inc., Altria Group, Inc., Facebook, Inc., General Electric Co., Google Inc., Intel Corp., Microsoft Corp., and Pepsico, Inc. as Amici Curiae in Support of Petitioner, *Jacobsen*, 310 P.3d 452 (No. 13-916), 2014 WL 825203.

73. Allstate Ins. Co. v. Jacobsen, 134 S. Ct. 2135 (2014).

74. 564 U.S. 338 (2011).

75. Braun v. Wal-Mart Stores, Inc. 24 A.3d 875, 883 (Penn. Super. Ct. 2011) (per curiam).

76. *Id.* at 885.

77. *Id.* at 886.

78. *Id.*

79. *Id.* at 889.

In posttrial proceedings, the state court added statutory, liquidated damages for each class member, totaling $62.25 million, and $45.7 million in attorney fees, as well as interest and other state statutory penalties. This resulted in a $187.6 million aggregate judgment.

On appeal, the state's intermediate appellate court relied on Pennsylvania law to conclude the liquidated damages required by state statute are not punitive, but rather are compensatory.[80] It affirmed the verdict with minor modifications. Wal-Mart had raised a due process challenge based on the fact that the verdict had been reached by extrapolating damages based on the testimony of six employees who testified. The court flatly rejected the idea that Wal-Mart had a right to question every single member of the class under Pennsylvania's class action procedure.

Wal-Mart then sought and obtained review from the state supreme court on the issue of the statistical extrapolation.[81] It argued that it was entitled to proof from each class member rather than extrapolation. Wal-Mart's principal argument alleged its due process rights were violated when the trial court subjected it to a "trial by formula," a procedural practice disfavored by the U.S. Supreme Court's decisions interpreting Federal Rule of Civil Procedure 23 in the *Dukes* decision.[82] The state supreme court observed that there was no extrapolation used in the trial court as to liability; rather, it was used only for calculating damages to the class as a whole.[83] Here, unlike *Dukes*, there was evidence of a company-wide policy.[84] Unlike the Montana Supreme Court, which also had a company-wide policy before it, the Pennsylvania Supreme Court rejected the argument that damages must be calculated individually and that tabulating class-wide damages would violate due process.[85] It thus affirmed the decision below.

Wal-Mart petitioned for a writ of certiorari to the United States Supreme Court in the Pennsylvania case. The petition presented a single issue: "Whether the Due Process Clause of the Fourteenth Amendment prohibits a state court from certifying a class action, and

80. *Id.* at 970.

81. Braun v. Wal-Mart Stores, Inc., 47 A.3d 1174 (Penn. 2012) (granting review as to "[w]hether, in a purported class action tried to verdict, it violates Pennsylvania law (including the *Pennsylvania Rules of Civil Procedure*) to subject Wal-Mart to a 'Trial by Formula' that relieves Plaintiffs of their burden to produce class-wide 'common' evidence on key elements of their claims").

82. Braun v. Wal-Mart Stores, Inc., 106 A.3d 656, 663 (Penn. 2014) ("In this appeal, Wal-Mart asserts that it was subjected to 'trial by formula,' a practice disapproved by the United States Supreme Court in *Wal-Mart Stores, Inc. v. Dukes* . . . and *Comcast Corp. v. Behrend* . . . .") (citations omitted).

83. *Id.* at 665.

84. *Id.*

85. *Id.* at 667.

entering a monetary judgment in favor of the class, where the court permits the use of extrapolation to relieve individual class members of their burden of proof and forecloses the defendants from presenting individualized defenses to class members' claims."[86] In 2016, yet again, the Supreme Court denied certiorari.[87]

While the Supreme Court has ducked the issue several times in the post-*Dukes* era, lower courts will continue to have to work through these arguments from the defense bar.[88] The persistence of these arguments in the lower federal courts and state courts makes it increasingly likely the Supreme Court will eventually have to weigh in on the scope of defendant due process rights with regard to class cohesiveness in class-wide litigation.

C. Weaving Together the Three Categories of Constitutional Challenges to Certification

The examples in this Article have shown there are at least three major categories of constitutional challenges emerging in the class certification process: (1) Article III challenges to the inclusion of non-injured, absent class members; (2) due process challenges to certifying claims for class-wide punitive damages; and (3) due process claims based on a purported right to present every available, individual defense against putative class members (and thus holding each putative class member to individual proof).

Courts and scholars have generally treated these as belonging in separate doctrinal silos. They are, however, closely related in their function in the class certification process. These arguments taken together cannot be fully appreciated from the vantage point of the *Federal Rules of Civil Procedure* because they transcend the rules.

Article III standing has long been linked to due process by procedural scholars who study class actions. Writing in 1979, Lea Brilmayer connected the similarity in concerns between due process and standing in constitutional litigation.[89] More recently, Sergio Campos went

86. Petition for a Writ of Certiorari, Wal-Mart Stores, Inc. v. Braun, 136 S. Ct. 1512 (2016) (No. 14-1123), 2015 WL 1201367.

87. *Braun*, 136 S. Ct. 1512.

88. *See, e.g.*, Johnson v. Nextel Commc'ns, Inc., 780 F.3d 128, 149 n.25 (2d Cir. 2015) (interpreting the Montana Supreme Court's decision in *Jacobsen* to stand for the proposition that "[t]he question of how the Supreme Court's punitive damages precedent should be applied to class actions has engendered significant debate in the lower federal and state courts and in academic scholarship").

89. Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the 'Case or Controversy' Requirement*, 93 HARV. L. REV. 297, 297–99 (1979) (observing "the fairness problems that would arise if an ideological challenger—a challenger without the traditional personal stake—were permitted to litigate a constitutional claim"); Sergio J. Campos, *Class Actions and Justiciability*, 66 FLA. L. REV. 553,

a step further, arguing that "justiciability is a deep due process concern."[90]

The theoretical linkage in the underpinnings of standing and due process helps explain the fluid slippage between the two in arguments regarding causation in class actions. When a defendant challenges certification because absent class members cannot show an injury caused by the defendant, the border between standing and due process is ephemeral, and the argument flows easily between both constitutional nodes.

Connecting standing to due process concerns in the context of causation and injury opens up a way to transfer some of the force of the defendants' arguments about uninjured class members to state courts. Indeed, it is a very small logical step to reframe the argument from one about absent class members failing to show a particularized, concrete injury to one about the failure to require a showing that the defendant's conduct *caused* unnamed class members alleged injuries, invoking potential due process concerns that apply in state courts.

Framed either way, when used in the class certification context, the point of the argument is to show that some of the class members are so different from other class members as to defeat aggregate litigation. That ultimately comes down to a request to defeat their claims individually for lack of proof. This illustrates how closely related the standing argument is to the other species of due process argument that focus on the need for individual proof in the class certification process. Both the purported right to present every available defense in class actions and the purported right to avoid class-wide punitive damages are grounded in a notion that proof of causation for every absent class member ought to be required.

Collectively, these due process arguments against state class actions add up to more than the sum of their parts: together, they would create massive barriers to the development of state class action procedures independent of the federal courts. The arguments jointly seek to triangulate due process in the bounds of individual litigation, potentially creating a constitutional barrier to any aggregate resolution of claims.

III. THE HISTORICAL CONSTITUTIONAL LIMITS ON AGGREGATION

The U.S. Supreme Court has long recognized that class actions operate in an exceptional procedural space.[91] This exceptional procedu-

600 (2014) (crediting Brilmayer with being the first to observe the connection between due process and justiciability).

90. Campos, *supra* note 89, at 613.

91. Hansberry v. Lee, 311 U.S. 32, 40 (1940) ("It is a principle of general application

ral space is bounded by stringent limits on who may be bound by a class-wide ruling.[92] In federal courts, the modern version of Rule 23(a) embodies these boundaries by requiring numerosity, commonality, typicality, and adequate representation, all of which the Court has found "effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.'"[93]

These constraints animated the original version of Rule 23 that appeared in 1938 with the first edition of the *Federal Rules of Civil Procedure* (FRCP), drawn from the former Equity Rule 38, which predated the *Federal Rules of Civil Procedure* and previously required a question "of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court."[94] Indeed, the committee that drafted the original version of Rule 23 was of the opinion that such a formulation was "a common test," pointing out several states also had such tests.[95] In other words, these constraints pre-existed Rule 23 in equity.

While the federal rule gives concrete structure to the special procedural space, the constitutional limits flow principally from two famous, mid-twentieth century cases: *Hansberry v. Lee*[96] in 1940, and a decade later *Mullane v. Central Hannover Bank & Trust Co.*,[97] both of which predated the 1966 amendment to Rule 23, which gave the rule its modern structure. Indeed, the committee that drafted the 1966 amendment to Rule 23 showed acute awareness of both of these decisions.[98]

Both decisions emphasized the procedural due process rights of absent parties, focusing on *claims* potentially precluded by a judgment. Crucially, these foundational cases did not involve defendants' rights.

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in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process . . . . To these general rules there is a recognized exception . . . the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it."); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011) (describing class actions as "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only") (quoting Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979)).

92. *See Dukes*, 131 S. Ct. at 2550 ("In order to justify a departure from that rule, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.") (internal quotations omitted).
93. *Id.* (quoting General Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982)).
94. FED. R. CIV. P. 23(a) advisory committee's note to 1937 amendment.
95. *Id.* (discussing DEL. CT. CH. R. 113, FLA. COMP. GEN. L. ANN. § 4918(7) (Supp. 1936); GA. CODE § 37-1002 (1933), ALA. CODE § 5701 (1928); IND. CODE ANN. § 2-220 (1933); N.Y.C.P.A. § 195 (1937); WIS. STAT. § 260.12 (1935)).
96. 311 U.S. 32 (1940).
97. 339 U.S. 306 (1950).
98. FED. R. CIV. P. 23(d)(2) advisory committee's note to 1966 amendment (discussing notice).

Later, the Court added to this foundation in *Phillips Petroleum Co. v. Shutts*, for the first time drawing a distinction between the level of due process concern afforded plaintiffs and defendants in class actions.[99]

These decisions comprise the foundational "constitutional canon" related to procedural due process for class actions, namely the cases in which the Court squarely confronted an issue of constitutionality related to class actions.[100] Finally, *Mathews v. Eldridge*,[101] an administrative law decision that on its face does not seem to speak to class actions, has become the modern touchstone of procedural due process in civil litigation generally.[102]

A. The Constitutional Canon for Class Actions: Flexibility and Pragmatism

Hansberry v. Lee is generally understood to be the wellspring of procedural due process in class actions.[103] The opinion began with a basic and oft-cited premise, famously pronouncing that "one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."[104] The Court nevertheless recognized that class actions are an exception to this maxim, and this exception has an old pedigree. Thus, "there is scope within the framework of the Constitution for holding in appropriate cases that a judgment rendered in a class suit is res judicata as to members of the class who are not formal parties to the suit."[105] In other words, by the middle of the twentieth century, it was clear that the Constitution allows class actions to bind absent parties if properly certified.

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99. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

100. There are, of course, many other important Supreme Court cases about class actions that are not constitutional decisions; rather they are interpretations of Rule 23.

101. 424 U.S. 319, 333–34 (1976) (reviewing procedures to terminate Social Security benefits).

102. *See, e.g.*, Connecticut v. Doehr, 501 U.S. 1, 11 (1991) (applying the *Mathews* balancing test to ex parte attachment procedures in individual civil litigation); Heller v. Doe, 509 U.S. 312, 330–31 (1993) (applying the *Mathews* balancing test to state procedures used for involuntary commitment of mentally infirm persons); City of Los Angeles v. David, 538 U.S. 715, 716–17 (2003) (per curiam) (applying the *Mathews* balancing test to municipal procedures adjudicating challenges to enforcement of car-towing ordinance); Hamdi v. Rumsfeld, 542 U.S. 507, 529–30 (2004) (plurality opinion) (applying the *Mathews* balancing test to procedures for adjudicating a petition for writ of habeas corpus challenging detainment of alleged enemy combatant).

103. Campos, *supra* note 89, at 571 n.105.

104. Hansberry v. Lee, 311 U.S. 32, 40 (1940).

105. *Id.* at 42.

The Court expressly recognized in *Hansberry* that neither states nor federal courts were compelled by the Constitution "to adopt any particular rule for establishing the conclusiveness of judgments in class suits."[106] In other words, while due process *permitted* class actions, it did not *require* any particular form of them. The rules for class actions were left to the good judgment of the state and federal courts. Indeed, the Court even acknowledged the importance of federalism and variability in that procedure, emphasizing "a proper regard for divergent local institutions and interests."[107] Thus, from the Court's earliest analysis of the constitutionality of class actions, flexibility was the essence of the procedural fabric. Divergent local interests were woven into that fabric by design.

In sketching the outer constitutional boundary of that variability in class procedure, the Court held that due process would be violated "only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of *absent parties* who are to be bound by it."[108] Under the facts of *Hansberry*, such protection was missing because the parties who sought to enforce a covenant could not be in the same class with, and represent, the interests of those resisting performance of the same covenant.[109] Conflicting interest among the putative parties to the agreement created a due process problem to enforcement of the class judgment—one group could not fairly represent the other in the litigation.

Having declared the outer constitutional boundaries of adequate representation in *Hansberry*, the Court clarified the constitutional boundaries of the right to notice a decade later in *Mullane v. Central Hannover Bank & Trust Co.*[110] *Mullane* did not involve a class action, but rather a different kind of aggregate litigation involving beneficiaries of pooled investment trusts.[111] The issue was whether the accounting settlement would bind absent beneficiaries—analogous to the way a modern class judgment would bind absent class members. Because the action would terminate the potential claims of such beneficiaries, the Court held that due process required reasonable notice and an opportunity to be heard.[112] The Court rejected New York's notice-publication statute, as newspaper publication was unlikely to reach the intended beneficiaries. It famously declared "process which is a mere gesture is not due process."[113] However, it also rejected the petitioner's request to require notice by personal service to the large

106. *Id.*
107. *Id.*
108. *Id.* (emphasis added).
109. *Id.* at 44.
110. 339 U.S. 306 (1950).
111. *Id.* at 310–11.
112. *Id.* at 314.
113. *Id.* at 315.

group of potential beneficiaries.[114] Instead, due process required consideration of the nature of the class of beneficiaries here, and it was satisfied so long as the form was "reasonably certain to reach *most* of those interested in objecting."[115] In other words, the nature of the class of beneficiaries, the limits of the fund, and the practical challenges of delivering the notice were factors weighed in the constitutional balance, and "perfect" notice by individual, personal service was not the constitutional touchstone. Procedural due process thus was elastic enough to accommodate reasonable efforts, within the constraints of a large class.[116] No particular type of notice was constitutionally required; rather, a pragmatic, flexible standard applied, even allowing for the risk that it might not be effective at reaching every single beneficiary.[117]

This pragmatism mirrors the flexible approach announced in *Hansberry*. Indeed, in the latter half of the twentieth century, flexibility was the very hallmark of the constitutional ideal of procedural due process in court proceedings in many different contexts.[118] Rather than defining the methods for exactly how a state must in all circumstances implement the constitutional standard, *Hansberry* and *Mullane* left it up to the states to find solutions that worked in particular circumstances.

The Supreme Court's approach to procedural due process was reinforced as recently as 2006 in *Jones v. Flowers*, which involved the right to notice in individual, nonclass litigation.[119] Arkansas had re-

114. *Id.* at 318–19.

115. *Id.* at 319 (emphasis added) ("[N]o [personal] service is required under the circumstances. This type of trust presupposes a large number of small interests. The individual interest does not stand alone[,] but is identical with that of a class. The rights of each in the integrity of the fund[,] and the fidelity of the trustee[,] are shared by many other beneficiaries.").

116. *Id.* ("[C]onstitutional law, like other mortal contrivances, has to take some chances . . . .").

117. *Id.* ("Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objections sustained would inure to the benefit of all. We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable.").

118. Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands."); Cafeteria & Rest. Workers Union Local 473 v. McElroy, 367 U.S. 886, 895 (1961) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."); *accord* Fed. Commc'ns Comm'n v. WJR, The Goodwill Station, 337 U.S. 265, 275 (1949) ("[T]he right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations."); *see also* Underwood, *supra* note 17, at 797 (discussing the flexibility of due process in the class action context).

119. Jones v. Flowers, 547 U.S. 220 (2006).

lied upon the mailing of certified letters that had been returned to the sender "unclaimed" as notice of a tax sale.[120] The case showed that *Mullane*'s flexibility was still capable of generating an outer boundary: Arkansas officials were aware prior to the tax sale that the letters had not reached the intended homeowner because the letters had been returned to the sender, and failing to take some other action to notify the homeowner was impermissible.[121] However, the key to the opinion is the Court's recognition that the additional steps turned on what was practicable under the circumstances,[122] and the Court expressly declined to specify what additional steps state officials should have taken.[123] Indeed, the Court expressly embraced variation in state solutions implementing the basic right to notice: "The State can determine how to proceed in response to our conclusion that notice was inadequate here, and the States have taken a variety of approaches to the present question."[124]

Flexibility and openness to state solutions has been an uninterrupted theme in procedural due process from the mid-twentieth century to the Roberts Court. The flexible constitutional framework spawned by *Hansberry* and *Mullane* was also the backdrop against which the 1966 amendments to Rule 23 were drafted, creating the modern federal class action. Indeed, the Supreme Court recognized that Rule 23's provisions were designed to incorporate the procedural due process standards set forth in this early precedent.[125] In *Eisen v. Carlisle & Jacquline*, the Court even interpreted the notice provision in Rule 23(c) as requiring individual notice to class members as an extension of *Mullane*'s standard.[126]

The Court picked up the flexibility theme again in 1984 in *Philips Petroleum Co. v. Shutts*,[127] clarifying due process in class actions without diminishing the boundary's flexibility. *Shutts* presented two different constitutional issues, both focused on the members of a multistate plaintiff class: whether the Kansas state court had personal jurisdiction over absent, nonresident class members, and whether the state could apply its own substantive law to the claims of absent non-

120. *Id.* at 224.
121. *Id.* at 230, 234 ("In response to the returned form suggesting that Jones had not received notice that he was about to lose his property, the State did—nothing . . . . [W]e conclude the State should have taken additional reasonable steps to notify Jones, if practicable to do so.").
122. *Id.* at 234.
123. *Id.* at 234, 238 (noting that "[i]t is not our responsibility to prescribe the form of service that the [government] should adopt") (quoting Greene v. Lindsey, 456 US 444, 455 n.9 (1982)) (alternation in original).
124. *Id.* at 238.
125. Eisen v. Carlisle & Jaqueline, 417 U.S. 156, 173 (1974) (discussing the incorporation of *Mullane* into Rule 23).
126. *Id.* at 174.
127. 472 U.S. 797 (1985).

residents whose claims had no connection to the state. Both constitutional claims were pressed by the defendant *on behalf of* the class members.[128] None of the class members asserted these constitutional claims for themselves, and they objected to the defendant doing so.[129] The Court allowed the defendant to raise these arguments in the class context because the defendant "has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as petitioner is bound."[130]

Ultimately, the Court concluded that the class members could subject themselves to Kansas's jurisdiction by failing to opt out of the class action.[131] Its analysis focused entirely on the burden the assertion of jurisdiction would have on the absent class members, and not on the burden on the defendant.[132] Indeed the Court expressly framed the analysis in terms of the due process rights of *absent plaintiffs*.[133] Those rights afforded absent plaintiffs notice of the action, an opportunity to be heard and participate in the litigation, and some procedure by which a plaintiff might exclude himself from the action (opt out),[134] all which Kansas provided.[135]

The second constitutional claim involved the Kansas court's decision to apply Kansas's own law to all of the class members' claims, even though 97% of the plaintiffs had no connection to Kansas.[136] Kansas substantive law was in conflict with Texas substantive law on the viability of the claim and damages. Here, the Court found that the plaintiff class members' "consent" to Kansas law (by failing to opt out

128. *Id.* at 804.
129. *Id.* at 805 ("They . . . urge that petitioner's interference is unneeded because the class members have had opportunity to complain about Kansas' assertion of jurisdiction over their claim, but none have done so.").
130. *Id.* at 805 ("The only way a class action defendant like petitioner can assure itself of this binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members.").
131. *Id.* at 809–11.
132. *Id.* at 810–11 ("Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection. In most class actions an absent plaintiff is provided at least with an opportunity to 'opt out' of the class, and if he takes advantage of that opportunity he is removed from the litigation entirely.").
133. *Id.* at 811 ("The Fourteenth Amendment does protect 'persons,' not 'defendants,' however, so absent plaintiffs as well as absent defendants are entitled to some protection from the jurisdiction of a forum State which seeks to adjudicate their claims. In this case we hold that a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant.").
134. *Id.* at 812.
135. *Id.* at 813.
136. *Id.* at 814–15.

of the class) was not enough.[137] Instead, the Kansas court needed to find that Kansas had a "'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class . . . in order to ensure that the choice of Kansas law is not arbitrary or unfair."[138]

Much later, the concern over absent parties reemerged in *Amchem Products, Inc. v. Windsor*, where the Court focused on the procedural fairness of a certification for settlement where the settlement agreement was complex and fraught with conflicts of interest among the plaintiff class members.[139] The Court noted that class certification should not "sacrifice[ ] procedural fairness," but again its focus was on fairness to *absent class members*.[140]

These cases taken together illustrate that the constitutional boundaries related to class certification have historically emphasized the due process rights belonging to the absent members of the plaintiff class. Even when those rights are asserted by defendants (who may derive some benefit from the preclusive effect of certification, as in *Shutts*) the right itself has been a class member's right in the canonical cases.

B. Due Process in Civil Litigation: *Mathews v. Eldridge* and Its Progeny

The historically flexible approach to due process in class actions comports with the Court's approach to procedural due process in other contexts. In *Mathews v. Eldridge*,[141] the Court created the modern procedural due process doctrine now used in a wide variety of contexts. *Mathews* involved the constitutional adequacy of the administrative procedures to assess continued eligibility for social security disability benefits.[142] A petitioner whose benefits were terminated without a hearing challenged the constitutional validity of the agency's procedures. The Court recognized that procedural due process constrains "governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."[143] However, it rejected the notion that due process is a bright line constraint: "[D]ue process is flexible and calls for such procedural protections as the particular situation demands."[144]

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137. *Id.* at 820.
138. *Id.* at 821–22.
139. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).
140. *Id.* at 615 (internal citation omitted).
141. 424 U.S. 319 (1976).
142. *Id.* at 323–25.
143. *Id.* at 332.
144. *Id.* at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

The Court fashioned a three-factor balancing approach to capture the contextual nature of the doctrine:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[145]

Applying these factors to the constitutional inquiry afforded the agency substantial flexibility in fashioning its procedures for benefit determinations.[146] The key was that the procedures created "a meaningful opportunity" for affected parties to present their case, even though the procedures might not resemble a court evidentiary hearing.[147]

The *Mathews* balancing test was subsequently extended beyond administrative procedures to other contexts, including civil litigation procedures in cases between private parties. In *Connecticut v. Doehr*,[148] the Court relied on the *Mathews* doctrine to evaluate a constitutional challenge to a state's prejudgment attachment procedures in civil litigation.[149] Acknowledging that such disputes involve two private parties, unlike administrative decisions at issue in *Mathews*, it adjusted the balancing approach's third factor by focusing attention on the interest of the party seeking the remedy with "due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections."[150]

The Court took this balancing framework a step further in *Hamdi v. Rumsfeld*, a case involving the due process rights of an enemy combatant challenging the grounds for detention using a civil petition for a writ of habeas corpus.[151] The Court recognized that the *Mathews* balancing test was well established as "[t]he ordinary mechanism" applied to analyze procedural due process challenges.[152]

The Court has not yet applied the *Mathews* balancing approach to state or federal class action procedures, presumably because it has not yet taken up a defendant's procedural due process challenge to such procedures. However, the Court's long commitment to viewing due process through the lens of *Mathews* in other civil litigation contexts

145. *Id.* at 335.
146. *Id.* at 348 ("The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances.").
147. *Id.* at 349.
148. 501 U.S. 1 (1991).
149. *Id.* at 10.
150. *Id.* at 11.
151. 542 U.S. 507, 509, 528–29 (2004) (plurality opinion).
152. *Id.* at 528–29.

suggests that the approach is the fundamental yardstick by which due process challenges to class certification procedures ought to be measured. Indeed, the flexibility of the *Mathews* approach seems fully consistent with the pragmatic, flexible spirit of the historical class action canon.

C. The New Frontier: Movement Toward a National, Uniform Class Certification Procedure

The constitutional boundaries comprised of *defendant rights* in class actions is a new frontier with an inchoate and contested foundation. The historical canonical class action cases involved plaintiff rights (class members). Beyond that, *Mathews* suggests a fact-specific balancing of interests would be needed, though lower courts have not yet engaged in that task.

Some of the earliest examples of defendants asserting a due process right to present individualized defenses can be found in the late 1970s and early 1980s. These earliest attempts to carve out a particularized due process right for defendants in class actions met with mixed results in the lower courts.[153] These defendant-focused due process rights have no canonical Supreme Court doctrine to recommend them; they are instead attempts to carve out a new right with an array of different justifications.

While the constitutional boundaries protecting members of a plaintiff class have been expressly articulated by the Supreme Court since 1940, the rights of defendants have to be inferred from other sources. Defendants sometimes invoke the obscure case of *Lindsey v. Normet*[154] for the proposition that the Due Process Clause guarantees them a right "to present every available defense."[155] In *Lindsey*, a class of tenants sought to declare an Oregon unlawful detainer statute to be unconstitutional because the state procedure set an unreasonably fast timeframe on the eviction process, requiring that a trial to

153. *See, e.g.*, W. Elec. Co. v. Stern, 544 F.2d 1196, 1199 (3d Cir. 1976) (discussing the defendant's constitutional "right to present a full defense"). *But see* Matter of Cadillac V8-6-4 Class Action, 461 A.2d 736, 749 (N.J. 1983) (rejecting "GM's contention that certification of a class action would violate its right to due process of law under the Fourteenth Amendment by preventing it from asserting individual defenses, such as the treatment of the vehicles by each plaintiff and actual reliance on GM's representations").

154. 405 U.S. 56, 66 (1972) (quoting American Surety Co. v. Baldwin, 287 U.S. 156, 168 (1932)).

155. *See* Christopher Chorba & Blane H. Evanson, *Other Due Process Challenges to the Class Device*, *in* A PRACTITIONER'S GUIDE TO CLASS ACTIONS 737, 749 & n.74 (Marcy Hogan Greer ed., 2010). Mssrs. Chorba and Evanson are attorneys representing class action defendants. *See also Lawyers Search*, GIBSON DUNN (Oct. 11, 2016), http://www.gibsondunn.com/lawyers/pages/lawyerssearch.aspx?oid=LosAngeles#FindLawyers [https://perma.unl.edu/JB9N-5LRQ].

evict tenants for unpaid rent must begin just six days after service of the complaint unless the tenant posted security for accruing rent.[156] The tenants (who were the members of the *plaintiff* class) argued that the Oregon statute violated their due process rights. The Supreme Court observed in dicta that "[d]ue process requires that there be an opportunity to present every available defense."[157] The Court clearly was referring to the class members' "defense to their own eviction" at the trial in Oregon state court, not the right of the class action defendants in the federal declaratory relief action. In other words, *Lindsey* was about the class members' own right to be heard in their *individual* state eviction proceedings. The right at issue was the individual one of the tenant in their individual actions against their landlords.

The case said nothing whatsoever about the procedural rights of defendants *in class actions* to present "every available defense." The case thus offers no support for the proposition that *class action* defendants are entitled to present every individualized defense in the class action proceeding.

Moreover, in the Supreme Court's analysis, the right to present *a defense* was not a right to present *any specific substantive* defense. The *substantive* defenses available in the unlawful detainer action were simply not a constitutional matter.[158] Moreover, defendants invoking this argument with regard to class certification have yet to contend with the absence of bright-line rules generally in procedural due process doctrine. Extending *Mathews*, one would expect a court to balance the relevant interests in the increased procedural protection requested by the defendants (i.e., individualized proof in class actions). These interests would include: (1) the defendants' own interests in the benefit in presenting individualized defenses and (2) the risk of consideration of such individualized defenses in class litigation.[159]

1. Connecting Punitive Damages Doctrine with Class Certification

The effort to constitutionalize class certification gained significant traction after the Supreme Court's decision in *Philip Morris USA, Inc. v. Williams* in 2007, a case involving individual litigation, not a class action.[160] In limiting the availability of awards of punitive damages to this individual plaintiff in tobacco personal injury litigation, the Supreme Court focused on the constitutional limits forbidding "grossly

156. *Lindsey*, 405 U.S. at 63–64.
157. *Id.* at 66 (quoting American Surety Co. v. Baldwin, 287 U.S. 156, 168, (1932)).
158. *Id.* at 68 ("The Constitution has not federalized the substantive law of landlord-tenant relations . . . .").
159. *See Doehr*, 501 U.S. at 11 (discussing application of the *Mathews* test in civil litigation between private parties).
160. Philip Morris USA, Inc. v. Williams, 549 U.S. 346 (2007).

excessive" punitive damages previously articulated in *BMW of North America, Inc. v. Gore*,[161] and *State Farm Mutual Automobile Insurance v. Campbell.*[162] In *Williams*, the Court held due process forbids using punitive damages to punish a defendant for injuries inflicted upon nonparties.[163] In the context of this *individual* (non-aggregate) litigation, the Court observed that "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'"[164] The Court was specifically concerned with "piling on" punitive damages for the defendant's conduct directed at nonparties, rather than at the plaintiff.

As the Court explained, "[A] defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary."[165] The holding thus limited punitive damages to the conduct within the four corners of the case at issue. However, in certified class actions, the four corners of the case *includes* absent class members, once the case is certified. The other alleged victims in a class action are not strangers to the litigation, but are actually *members of the class* suing the defendant for its class-wide conduct.[166] They will be bound by the judgment, and thus in no way ought to be deemed "nonparties" in the sense used by the *Williams* court.[167] Indeed James Underwood has aptly pointed out that the Supreme Court itself has recognized the due process rights *of absent class members* in class litigation,[168] so it is nonsensical to describe them as "strangers" in the sense of *Williams.*[169] Moreover, arguments that putative class actions (which by definition have not yet been certified) involve "strangers" (absent parties not yet repre-

161. 517 U.S. 559 (1996).

162. 538 U.S. 408 (2003).

163. *Williams*, 549 U.S. at 353 ("In our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation.").

164. *Id.* (quoting Lindsey v. Normet, 405 U.S. 56, 66 (1972)).

165. *Id.* at 353–54.

166. *See, e.g.* Underwood, *supra* note 17, at 797–98.

167. *Id.*

168. See discussion of the "due process class action canon" *infra* section III.A.

169. Underwood, *supra* note 17, at 797 ("Those who would . . . equate unnamed class members with 'strangers' to the litigation—whose harm cannot be used to punish a tortfeasor under *Phillip Morris [v. Williams]*—are obviously misapplying the Court's mandate because class members are clearly bound by the results of a properly certified class action and their claims are finally adjudicated on their behalf with the Court's oversight and permission.").

sented by the named party) are not necessarily arguments against certification, if the requirements for certification are met—once the class is certified, the "stranger" problem vanishes.

Other academic commentators have a range of views on what *Williams* means for class actions. Keith Hylton has taken an aggressive position, arguing that *Williams* punitive damages holding implies that *all* class actions are unconstitutional, reading the case to imply that aggregate judgments inherently violate due process because "the only real plaintiffs are the class representatives."[170] Sheila Scheuerman staked out a narrower reading, arguing that only *some* class actions involving punitive damages are forbidden.[171] Linda Mullinex focused on incorporating *Williams* into the Supreme Court's interpretation of Rule 23, concluding that "prevailing class action jurisprudence, integrated with the Court's punitive damage jurisprudence, is unlikely to support certification of a Rule 23(b)(3) punitive damage class."[172] Attorneys Elizabeth Cabraser and Thomas Sobol argued that combining Rule 23 doctrine with punitive damages doctrine would allow certification of mandatory classes for punitive damages under Rule 23(b)(1).[173] By contrast, James Underwood has argued that the Supreme Court's punitive damages cases (including *Williams*) should be read as reflecting a concern for redundant punitive awards in multiple, different cases.[174] Under this view, certification of punitive damage class actions is beneficial because it *avoids* the problem of multiple punitive damages awards against a single defendant.[175]

This Article does not seek to resolve the scholarly debate, other than to highlight that the scholars who read *Williams* as a death-knell for class certification in mass tort cases involving punitive damages generally reach that point by combining the Supreme Court's due process analysis regarding punitive damages (in an individual case) with interpretations of Federal Rule 23. *Williams* itself focused on individual litigation, on its face it saying nothing about class actions, so deriving its implications in federal class certification logically depends

170. Keith N. Hylton, *Reflections on Remedies and* Philip Morris v. Williams, 27 REV. LITIG. 9, 29 (2009). *But see* Underwood, note 17, at 158 (disagreeing with Professor Hylton's "extreme" reading of *Philip Morris v. Williams*, arguing this reading "ignores the reams of published federal court opinions treating class members as parties to certified class actions").

171. Sheila B. Scheuerman, *supra* note 17, at 884 ("[W]here harm to the class is individualized, punitive damages cannot be pursued as a class-wide remedy."); *accord* Byron G. Stier, *Now It's Personal: Punishment and Mass Tort Litigation After* Philip Morris v Williams, 2 CHARLESTON L. REV. 433 (2007–08).

172. Mullenix, *supra* note 17, at 850.

173. Elizabeth J. Cabraser & Thomas M. Sobol, *Equity for the Victims, Equity for the Transgressor: The Classwide Treatment of Punitive Damages Claims*, 74 TUL. L. REV. 2005, 2026–27 (1999–2000).

174. *See, e.g.,* Underwood, *supra* note 17, 797–98.

175. *Id.* at 801.

on how it interacts with Rule 23. This is crucial, as it overlooks the impact of due process arguments in aggregate litigation in state courts.

Technical doctrinal analysis of the interplay between punitive damages and federal class action doctrine makes a valuable contribution in understanding certification procedure in federal court. In another sense, though, this approach misses the forest for the trees: the end game of the defense strategy appears to be the emergence of a transjurisdictional, national doctrine that prevent class certification in any forum, state or federal.

The *Jacobsen* case out of Montana illustrates this drift into state court class action strategy: Allstate tried to decertify the class *because* there was a claim for punitive damages. Montana's Supreme Court split the baby, leaving the class certified for purposes of determining the unlawfulness of Allstate's company-wide policy, while requiring compensatory and punitive damages to be determined on an individual basis later.[176] This partial win (allowing individual resolution of damages, as needed) did nothing to ameliorate the defendant who wanted out of the class action altogether. Indeed, all questions presented to the U.S. Supreme Court by the defendant focused on precluding class certification entirely based on due process.[177]

2. *Constitutionalizing* Wal-Mart Stores v. Dukes

Before the ink was even dry on the Supreme Court's landmark decision in *Wal-Mart Stores Inc. v. Dukes* in 2011,[178] some commentators had already begun to speculate whether it might have a "constitutional overtone," even though it was decided solely as a matter of interpreting Federal Rule 23.[179] This path making Title VII class action involved gender discrimination claims for Wal-Mart employees seeking injunctive relief and financial compensation in the form of backpay.[180] The Supreme Court reversed the en banc ruling of the Ninth Circuit which had upheld certification of a nationwide class under Rule 23(b)(2).[181] The class was massive, with 1.5 million female Wal-Mart employees as plaintiffs.

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176. *See supra* discussion section II.B.1.
177. Petition for a Writ of Certiorari at i, Allstate Ins. Co. v. Jacobsen, 310 P.3d 452 (2014) (No. 13-916), 2014 WL 342624 at *i.
178. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).
179. *See* Sergio Campos, *The Constitutional Overtones of Wal-Mart*, PRAWFS BLAWG (Jun. 21, 2011, 1:39 PM), http://prawfsblawg.blogs.com/prawfsblawg/2011/06/the-constitutional-overtones-of-wal-mart.html [https://perma.unl.edu/H58W-NYY9]; Lyle Denniston, *Opinion analysis:* Wal-Mart's *two messages*, SCOTUSBLOG (Jun. 20, 2011, 2:02 PM), http://www.scotusblog.com/2011/06/opinion-analysis-wal-marts-two-messages/ [https://perma.unl.edu/M6SN-4NYZ].
180. *Dukes*, 564 U.S. at 365–66.
181. *Id.*

Under that Rule 23(b)(2), certification may be obtained where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[182] In addition to interpreting that rule, the opinion also interprets the certification requirements for any class action set forth by Rule 23(a), focusing on the requirement in Rule 23(a)(2) that "questions of law or fact [be] common to the class."[183] The Court interpreted this to mean class members "suffered the same injury."[184] Moreover, the class-wide "common contention" regarding their injury "must be of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[185] As the Title VII claimants in the Wal-Mart employee class were suing for individual employment decisions, the Court found they needed "some glue holding the alleged reasons for all those decisions together."[186] Without a company-wide employment policy at issue in the litigation, all they had were individual decisions of store managers for each employee, which made it "impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*."[187]

This holding rested on a finding that Wal-Mart permitted discretionary employment decision making and had no company-wide employee evaluation method.[188] The putative class relied on statistics and social science to create an inference of discrimination, in the absence of such a company-wide policy.[189] The Court rejected the statistical methodology offered by the putative class experts as insufficient to prove class-wide discrimination: an inference of the existence of sex-based disparity was deemed insufficient to prove the specific discriminatory "pattern or practice" Title VII claim at issue.[190]

Were a plaintiff to establish such a "pattern or practice" in an employment discrimination case, a defendant would have the right to raise individual affirmative defenses demonstrating other lawful reasons for denying employment opportunities.[191] In other words, if an employee seeking backpay were to prevail in making a prima facie showing of discrimination, the burden shifts to the employer to show a

182. FED. R. CIV. P. 23(b)(2).
183. *Dukes*, 564 U.S. at 350.
184. *Id.* at 350 (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 157 (1982)).
185. *Id.*
186. *Id.* at 352 (emphasis omitted).
187. *Id.* (emphasis in original).
188. *Id.* at 353–54.
189. *Id.* at 353.
190. *Id.* at 355.
191. *Id.* at 366.

nondiscriminatory reason for the adverse employment action.[192] That conclusion flows from the *substantive law* of Title VII, not from Rule 23.[193] Based on this substantive law, the Court rejected deciding class-wide backpay using sample sets to test the individual defenses in order to model the percentage of valid claims in the class.[194] Denying class certification thus turned at least in part on the specific statutory defenses available under Title VII, which Rule 23 could not accommodate on a class-wide basis.

The decision thus turned on the nature of Rule 23 when combined with Title VII's substantive law. It was fundamentally an interpretation of the commonality requirement of Rule 23(a) (and the relief available in classes certified under Rule 23(b)(2)) in a particular statutory context. There was thus no constitutional foundation for the decision that would transcend its substantive law or Rule 23.

Although *Dukes*'s holding involved the need to interpret Rule 23, Justice Scalia considered taking the *Dukes* opinion out of the realm of the federal rules and into the realm of due process protection for defendants in a later case. However, he did so without the support of any other justices in *Philip Morris USA, Inc. v. Scott*, a tobacco case that came out of a Louisiana state court, in which the defendant sought certiorari the same term *Dukes* was decided.[195]

The case emerged after the Fifth Circuit decertified a nationwide class of smokers in *Castano v. American Tobacco*,[196] causing smaller state court class actions to proliferate.[197] One case of these spin-off cases in Louisiana resulted in a victory for the plaintiff class bringing a novel "addiction as injury" claim regarding nicotine in cigarettes. The class received a $241.5 million fund for a ten-year, court-supervised smoking cessation program.[198] When the defendants were unable to obtain reversal on appeal in state court, they petitioned for certiorari to the U.S. Supreme Court and sought to stay the judgment.[199] The defendants sought review of the alleged violations of their right to due process based on the manner in which the class trial had been conducted in state court. The defendants argued that: (1)

192. *Id.*

193. *See id.* (citing Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 361 (1977)).

194. *Id.*

195. Philip Morris USA, Inc. v. Scott, 131 S. Ct. 1 (2010) (Scalia, J., in chambers).

196. Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996).

197. *See* Susan E. Kearns, *Decertification of Statewide Tobacco Class Action*s, 74 N.Y.U. L. REV. 1336, 1354 (1999) (predicting the proliferation of "son of Castano" suits).

198. Scott v. Am. Tobacco Co., 36 So.3d 1046, 1059 (La. App. 4th Cir. 2010).

199. Application for Stay, *Scott*, 131 S. Ct. 1 (No. 10-735), http://sblog.s3.amazonaws.com/wp-content/uploads/2010/09/PM-stay-applic-10A273.pdf [https://perma.unl.edu/ZBM8-H899].

they were denied the right to cross-examine adverse witnesses; (2) they were barred from presenting relevant defenses; and (3) the respondents secured a judgment without proving the essential elements of their claim.[200]

The state proceeding was noteworthy because in calculating the money needed to fund the smoking-cessation program, the trial court had broad discretion under state law to make such awards,[201] and the judge assumed 100% of smokers in the state would use the program. Even the class's own expert predicted a utilization rate of just 5% (creating a liability of just under $12 million).[202]

In the fraud claim, the trial court had decided that individual reliance was not an issue in the trial; the jury in the first phase had already found liability for distorting the body of public knowledge, creating a common injury for the class as a whole.[203] It thus concluded that there was no reason to allow *individual defenses* as to reliance in the next phase of the trial.[204]

In September 2010, Justice Scalia issued the defendants' requested stay,[205] hinting that he thought that the certiorari petition was likely to be granted in order to review the due process issues raised by the case. In the stay, Justice Scalia intimated that due process may have been violated by the elimination of a requirement for plaintiffs to prove (and an opportunity for defendants to contest) that individual plaintiffs believed and relied upon the tobacco manufacturers' alleged misrepresentations.[206] Justice Scalia's stay order suggested that bypassing individual reliance to decide fraud on a class-wide basis could potentially violate the U.S. Constitution.[207] His stay order thus indicated that not only was it likely that certiorari would be granted but also that the state court's judgment would be reversed.[208]

Commentators expected certiorari to be granted, and some even boldly predicted that the Court might instead simply vacate the Louisiana decision and remand the case to Louisiana to reconsider in light of the Supreme Court's decision in *Wal-Mart Stores v. Dukes*.[209] To the surprise of many, in June 2011, the Supreme Court denied certio-

200. Application for Stay at 28–32, *Scott*, 131 S. Ct. 1.
201. Jordan v. Travelers Ins. Co., 245 So. 2d 151 (La. 1971); Lou-Con, Inc. v. Gulf Building Services, Inc., 287 So. 2d 192 (La. App. 4th Cir. 1973).
202. Application for Stay at 35, *Scott*, 131 S. Ct. 1. The defendants had agreed that the program would cost $153 per participant, but they disputed the utilization rate. *See id.*
203. *Scott*, 949 So. 2d at 1273.
204. *Id.* at 1271–72.
205. *Scott*, 131 S. Ct. 1 (J. Scalia, in chambers).
206. *Id.* at 4.
207. *Id.*
208. *Id.*
209. *SCOTUS Denies Cert. After Staying $250M+ Class Action Judgment*, CIVIL PROCEDURE & FEDERAL COURTS BLOG (Jun. 30, 2011), http://lawprofessors.typepad.

rari.[210] The Court was thus unwilling to use the case as a vehicle to constitutionalize class certification, at least at that moment.

The state court developments discussed in section II.B in Montana and Pennsylvania are the direct descendants of the effort to constitutionalize *Dukes* through the *Scott* case. Having failed in *Scott*, the defense bar continues to push the argument in state supreme courts, perhaps increasing the likelihood that the Supreme Court may someday take up the argument. In *Jacobsen*, the case out of Montana, Allstate's unsuccessful certiorari petition explicitly asked the Supreme Court to declare *Dukes*'s holding with regard to Federal Rule of Civil Procedure 23(b)(2) to be a constitutional holding binding on the states.[211] Indeed, it pointed out the different approaches of states on the requirements for certifying the type of classes governed by Rule 23(b)(2).[212]

After *Williams* and *Dukes*, arguments have proliferated in the lower courts asserting a due process right to individual defenses and individualized proof in class actions—these arguments routinely encompass liability, compensatory damages, and punitive damages. Some lower courts have recently agreed with the defendants, recognizing a constitutional right to present individual defenses.[213] Other state and federal courts that have considered the question have disagreed with the aggressive expansion of due process to encompass a right to present individual defenses in class actions.[214] The defendants' arguments thus have met mixed results in the lower courts.

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com/civpro/2011/06/scotus-denies-cert-after-staying-250m-class-action-judgment.html [https://perma.unl.edu/H76D-SQPC]; Denniston, *supra* note 179.

210. Philip Morris USA, Inc. v. Jackson, 564 U.S. 1037 (2011).

211. Petition for Writ of Certiorari at 20–21, Allstate Ins. Co. v. Jacobsen, 310 P.3d 452 (2014) (No. 13-916), 2014 WL 342624 at *20–21.

212. *Id.* at 25 (discussing the approaches of Montana, New Mexico, and Ohio's courts in certifying class actions).

213. Equal Emp't Opportunity Comm'n v. Performance Food Grp., Inc. 16 F. Supp. 3d 576, 580–81 (D. Md. 2014) ("The Court finds the EEOC class-wide award approach not only unworkable, but also violative of the rights of PFG and, potentially, the rights of those individuals on whose behalf the EEOC has made a claim."); Makaeff v. Trump Univ., L.L.C., 309 F.R.D. 631, 642–44 (S.D. Cal. 2015) (finding that in order to comply with due process, the defenses must be able to present all individual defenses it might have in the damages phase of the class action). *Accord* McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 231–33 (2d Cir. 2008) (holding that aggregate litigation of liability for the class followed by individualized distribution violates due process); Carrera v. Bayer Corp., 727 F. 3d 300, 307 (3d Cir. 2013) ("A defendant has a . . . due process right to challenge the proof used to demonstrate class membership . . . ."); Rollins, Inc. v. Butland, 951 So. 2d 860, 874 (Fla. Dist. Ct. App. 2006) ("Although a trial court confronting a massive class action may find it tempting to allow proof of 'patterns' and 'common schemes' to paper over the dissimilarities attendant to individual claims, considerations of administrative convenience do not trump the class action.").

214. *In re* Pharm. Indus. Average Wholesale Price Litig., 582 F.3d 156, 197–98 (1st Cir. 2009) ("Challenges that such aggregate proof affects substantive law and

Despite the mixed results, the due process arguments have become a common theme in challenges to class certification: defendants regularly claim their due process rights will be violated if they cannot "present every available defense,"[215] which they assert can only be done individually.

D. Scholarly Critiques of the New Due Process Constraints in Class Actions

Expanding defendant procedural due process rights to restrict class certification has generally not been well received by most academic commentators. Alexandra Lahav has observed that under the "traditional conception of due process," the right embodied "the process and rights traditionally available in Anglo-American law."[216] If this is the foundation, then then the history of Anglo-American understandings of the right must be the starting point.

Carefully tracing the procedural due process rights of civil defendants from the Framing period forward to the twenty-first century,

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otherwise violates the defendant's due process or jury trial rights to contest each member's claim individually, will not withstand analysis."); Jimenez v. Allstate Ins. Co. 765 F.3d 1161, 1166–67 (9th Cir. 2014) ("[I]n this circuit . . . damage calculations alone cannot defeat class certification, ...") (quoting Yokoyama v. Midland Nat'l Life Ins. Co., 594 F.3d 1087, 1094 (9th Cir. 2010)); Mullins v. Direct Dig., L.L.C., 795 F.3d 654, 672 (7th Cir. 2015) (rejecting a heightened ascertainability requirement for class certification based on due process); Iorio v. Allianz Life Ins. Co. of N. Am., 2009 WL 3415703, *3 (S.D. Cal. 2009) (rejecting the argument that "individualized hearings on the issue of punitive damages are necessary to preserve due process rights"); *see id.* at *6 ("Defendant's argument that individualized hearings regarding the extent of injury and the circumstances surrounding the injury are necessary to satisfy due process is not persuasive."). *Accord* Joseph v. Gen. Motors Corp. 109 F.R.D. 635 (D. Colo. 1986) (rejecting "GM's contention that certification of a class action in this case would violate its right to due process of law under the Fourteenth Amendment by preventing it from asserting individual defenses such as treatment of the vehicles by each of the plaintiffs (*if relevant*), and actual reliance on GM's express warranties and representations."); Equal Emp't Opportunity Comm'n v. Outback Steak House of Fla., Inc., 576 F. Supp. 2d 1202, 1206–07 (D. Colo. 2008); Nat'l Cash, Inc. v. Loveless, 205 S.W.3d 127, 131 (Ark. 2005) ("The mere fact that individual issues and defenses may be raised by the company regarding the recovery of individual members cannot defeat class certification where there are common questions concerning the defendant's alleged wrongdoing which must be resolved for all class members."); Exxon Mobil Corp. v. Gill, 221 S.W.3d 841, 857 (Tex. App. 2007), *vacated on other grounds by* Exxon Mobil Corp v. Gill, 299 S.W.3d 124 (Tex. 2009) (rejecting defendant's due process argument regarding individual defenses); Hale v. Wal-Mart Stores, Inc., 231 S.W.3d 215, 228 (Mo. Ct. App. 2007) ("[T]here is no absolute right to individualized determinations of damages."); Perrine v. E.I. du Pont de Nemours & Co., 694 S.E.2d 815 (W.V. 2010) (concluding the defendant's individual evidence arguments had "no merit").

215. *See* Chorba & Evanson, *supra* note 155, at 749 & n.74.

216. Alexandra Lahav, *The Future of Class Actions*, 44 LOY. U. CHI. L.J. 545, 546 (2012).

Mark Moller observes the Framing generation of lawyers inherited a common law tradition regarding evidence and proof that was quite restrictive and frequently barred juries from considering probative evidence.[217] This tradition also "heavily regulated, and rationed, parties' proof opportunities by policing parties' burdens of proof . . . ,"[218] and "there was simply no absolute right to present any particular quantum of evidence."[219] Rather, courts had broad discretion to control the submission of evidence.[220] Thus, due process under the Fifth Amendment would not have protected a defendant's right to "every available defense" in the traditional understanding at the time of the Bill of Rights' adoption.

According to Moller's historical research, due process instead was understood by the Framing generation to mean "a right to a hearing before an *independent* judiciary prior to the deprivation of rights."[221] He describes due process as focused (since the time of the Magna Carta) on "the institution that must do the depriving" of those rights (namely "a deliberative, independent judiciary").[222] Under this view, due process was a structural buffer to protect against "legislative interference in courts' traditional discretion to determine 'the effect of evidence.'"[223] Moller presents a persuasive case for the conclusion that the Framing generation understood the term in the narrow sense as had long been understood by English lawyers.[224]

Based on an analysis of both modern procedural due process doctrine and history, he concludes these class action due process claims "are losers"[225] because they are founded on long-repudiated views of due process. He demonstrates that the history of these modern defense arguments against class certification are firmly rooted in the due process notions popularized at the turn of the twentieth century in the *Lochner* era.[226] He connects the emergence of a right to present "all facts" to the *Lochner* Court's expansive view of both procedural and substantive due process, a view that collapsed with the New Deal Court.[227] Moller argues that the economic substantive due process

217. Mark Moller, *Class Action Defendants' New Lochnerism*, 2012 UTAH L. REV. 319, 343 (2012).
218. *Id.* at 344.
219. *Id.* at 348.
220. *Id.* at 320, 348.
221. *Id.* at 336.
222. *Id.* at 337.
223. *Id.* at 366.
224. *See id.* at 363 (discussing the writing of John Adams and Alexander Hamilton).
225. *Id.* at 324.
226. *Id.* at 322 (referring to Lochner v. New York, 198 U.S. 45 (1905)).
227. *Id.* at 322. Moller points out that by the end of the nineteenth century, the understanding of due process had shifted to focus on the outcome rather than the institution, focusing on the "truth-seeking value of robust adversarial presentation of evidence." *Id.* at 368. As the *Lochner*-era shifted to focus upon "unaccept-

concerns of the *Lochner* era were deeply connected with the emergence of a procedural focus on a full and fair defense.[228]

As the *Lochner*-era collapsed into the New Deal era in the early twentieth century, Moller opines that *Hansberry v. Lee* marked the end of the pre-New Deal view of procedural due process, reducing due process in the class action to adequate representation, free of intraclass conflicts of interest.[229] He points out the Court ignored arguments before it about the failure to present all the facts related to the enforceability of a racial covenant, which Hansberry's attorneys had presented in the *Lochner*-era mode: Hansberry should not be deprived of his property without a chance to present all facts relevant to his defense of that property.[230] The Court ignored that argument, focusing entirely on the structural defect in class representation.[231]

By the middle of the twentieth century, the Court shifted to balancing concerns with efficiency against the risk of erroneous deprivation, anticipating the modern *Mathews v. Eldridge* approach.[232] All of this leads to a conclusion that the modern constitutionalization of certification has no viable support in constitutional history without reviving *Lochner*-era understandings of due process.

Jill Wieber Lens makes an important contribution to the historical rebuttal of the purported right to "every available individual defense" by showing that the judicial understanding of procedural due process at the time of the Fourteenth Amendment's ratification would not have supported the modern defense arguments about due process.[233] She observes that punitive damages were already an established part of American tort law, and nineteenth century courts required no specific procedures regarding such damages or their defenses.[234]

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ably high risk of an erroneous liability judgment" that might deprive one of property, the adversarial hearing came to embody the right to mount a defense based on "all of the facts." *Id.* at 371–73.

228. *Id.* at 373–76.

229. *Id.* at 379.

230. *Id.* at 380.

231. *Id.* at 381–82.

232. *Id.* at 382; *see* Mathews v. Eldridge, 424 U.S. 319 (1976).

233. Jill Wieber Lens, *Tort Law's Deterrent Effect and Procedural Due Process*, 50 TULSA L. REV. 115, 137 & n.151 (2014).

234. *Id.* at 137 & n.151 ("In 1868, when the Fourteenth Amendment was adopted, punitive damages were undoubtedly an established part of the American common law of torts. It is just as clear that no particular procedures were deemed necessary to circumscribe a jury's discretion regarding the award of such damages, or their amount.") (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 26–27 (1991)) (Scalia. J., concurring); *see also* Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 204–06 (2003) (recognizing the existence of punitive damages in the nineteenth century).

Lens argues that the historical values underlying procedural due process also fail to support the constitutionalization of class certification and attacks on punitive damages. She describes a "process-based theory of due process," that at best protects the right of a defendant to "participate *meaningfully*."[235] She points out that both *Walmart* and *Philip Morris* had these rights in the relevant litigation that came before the Supreme Court. She argues that this meaningful participation turned not on the "subjective desires" of these defendants to present any particular proof, but on the ability to present defenses responsive to the tried, aggregate claims.[236]

Lens also identifies an "outcome-based theory" of procedural due process that "requires procedures necessary to achieve substantively accurate outcomes."[237] She contends that any alleged increase in accuracy through individual proceedings would be "inconsequential," when compared to the extensive costs of non-aggregate litigation.[238]

This balancing under her outcome-based theory reflects the balancing test in *Mathews*, which balanced the value in additional procedural protections against their cost to assess procedural due process.[239] As discussed in section III.B, the *Mathews* decision reflected the same flexible pragmatism at the heart of the mid-twentieth century canonical class action decisions.[240] Under *Mathews,* there is no bright-line right to any particular procedure ensuring absolute accuracy; instead, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands."[241] This was a fundamental shift away from the traditional view of due process (based on history) toward a cost-benefit approach weighing the risk that a procedure may produce errors in outcome against the benefit that increased procedural safeguards might produce for the parties or the government.[242]

In the era of the canonical due process cases, Lahav points out that the class action device generally fared well in this balancing ap-

235. Lens, *supra* note 233, at 138.
236. *Id.* at 140.
237. *Id.* at 141.
238. *Id.*
239. *Id.* at 148.; *see* discussion *supra* Part III.B.
240. *See supra* section III.A–B (discussing *Hansberry*, *Mullane*, and *Mathews*).
241. Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)); *see also* Lens, *supra* note 233, at 150 (noting that "*Mathews* acknowledged that improved accuracy cannot be the only consideration—perfect accuracy is not attainable and constitutionality should not be based on attempts to achieve the impossible. Plus, a categorical right would also be absurdly broad; the defendant would be entitled to any procedural protections that might improve the accuracy of the results, perhaps even only infinitesimally. But perfect accuracy is not possible and the Court recognizes so. Thus, the Court likely did not mean to define some new broad outcome-based right for defendants.").
242. Lahav, *supra* note 216, at 550.

proach.[243] She reads *Wal-Mart v. Dukes* as a retreat away from this balancing approach toward bright-line procedural rules.[244] However, she suggests that the balancing framework could have equally emphasized the benefits of aggregate litigation.[245] The cost-benefit balancing model of due process thus does not offer much of a foundation for the modern constitutional arguments against certification.

Lahav identifies one theory of due process that could support the expansion of procedural due process sought by class action defendants: a "dignitary theory" based on the value of individual participation in the judicial process.[246] This theory was birthed by scholars, not courts. She sees the "threads of the dignitary theory" woven into defense arguments asserting a due process right to present individual defenses in class actions, even though courts have not picked up on these threads.[247] It is crucial to note this is a theory in search of doctrine, as this theory of due process has not been reified by precedent. This is, at best, an argument for a version of right that does not yet exist in the Supreme Court's due process decisions. It would require jettisoning both *Mathews*'s cost-benefit balance and traditional views of due process.

Finally, Lahav also identifies an "equality" view of due process based on a notion that the doctrine should equalize the litigation opportunities for individuals and the outcomes of people with similar situations.[248] Here, the purported right to individual defenses gains no traction. Lahav argues that class actions equalize adversarial litigants with respect to resources by allowing class members to band together against a better-funded opponent, and also by ensuring like outcomes among class members.[249]

These academic criticisms of the defendant-centric view of due process in class certification collectively erode the constitutional grounding for the purported right, absent a major shift in due process doctrine from the Court. Lower federal courts that have recognized these rights to prevent class certification appear to have been unaware of the missing doctrinal foundation for these rights, at least as a matter of federal procedural due process doctrine.

There is another very important reason to be dubious of the reworking of due process doctrine to attack class certification that has not yet been explored in the scholarly critiques—federalism. The im-

243. *Id.* at 551 (discussing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985), in which the Court weighed the value of the benefits of class litigation against the economic cost of individual litigation).
244. *Id.* at 553.
245. *Id.*
246. *Id.* at 554.
247. *Id.* at 555.
248. *Id.* at 555–56.
249. *Id.* at 556–57.

portance of federalism in procedure has generally been ignored by the scholarship examining the due process doctrine in this context. Part III fills that gap, layering on the constitutional value of federalism as an independent concern that ought to prevent the Supreme Court from reworking due process to tinker with the class certification process.

IV. RECONSTRUCTING FEDERALISM IN THE CLASS ACTION LANDSCAPE

Thomas Main wisely pointed out in 2003 that "[c]enturies of legal history confirm that flexible and discretionary rules and standards of any form tend to rigidify over the course of time."[250] He made this observation at the dawn of the twenty-first century, in the context of the changing interpretation of the *Federal Rules of Civil Procedure* generally.[251] Indeed, he showed that the Supreme Court's increasingly technical, narrow, obstacle-strewn interpretations of Rule 23 "constrain[ed] judicial inventiveness" in mass tort litigation.[252] His observation, however, has implications far beyond Rule 23.

Procedural due process in the latter half of the twentieth century evolved into a constitutional doctrine that embraced pragmatic solutions to unique factual circumstances, giving states broad latitude to craft local solutions.[253] The potential expansion of procedural due process to bar class certification in state courts at issue here would ossify that procedural fabric through bright-line constitutional rules setting forth mandatory certification procedures for class actions—exactly the sort of rigid specificity the Court rejected in *Hansberry*, *Mullane*, *Flowers*, and *Mathews*.

The ossification Main described in the interpretation trends for the *Federal Rules of Civil Procedure* is threatening to jump out of the space of rule interpretation, into procedural due process doctrine, where it would affect the states. The post-*Dukes* challenges to state class certification seek to impose hard restrictions upon the states' ability to certify class actions by constitutionalizing limitations on certification. Recognizing the procedural due process right to present all available individual defenses would hamstring the states' ability to have their own class action certification rules differing from the most restrictive readings of Rule 23 by constitutionalizing those readings.

By constitutionalizing class certification objections, the defense bar is essentially arguing that there can only be "one procedure" to certify

250. Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 479 (2003).

251. *See id.*

252. *Id.* at 489–90, 508 ("[M]ore and longer procedural rules will never anticipate all of the eccentricities that fate or human ingenuity are 'virile enough to devise.'").

253. *See supra* section III.A (discussing *Mullane* and *Hansberry*).

a class, and that procedure must ensure individualized defenses to both liability and damages: *every* available, individual defense. Under this view, the states would not be laboratories of procedural innovation; they would instead become exact mirrors of federal procedure. The defense bar's attempts to constitutionalize class certification standards would suffocate the experimentation and divergence practiced by state courts. If they were successful, these arguments would eventually create a homogeneous, national class certification procedure.

To the extent that *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*[254] declared that class actions are mere joinder devices, then the corollary under the *Erie* doctrine must be that state courts should be free to follow their own state procedures in permitting or forbidding joinder. Moreover, the rules of evidence (which differ in state and federal courts) have long countenanced presumptions prohibiting the presentation of probative evidence and restrictions on the form in which that evidence might be. Those rules are not "unconstitutional" for disallowing defendants to bring forth any and all evidence they wish to bring.

All of this leads to questions about whether that procedural variance is valuable: why does it exist and how does it connect to federalism. Section III.A will turn to the value of state procedural autonomy in aggregate litigation; section III.B will then examine how this procedural autonomy connects to the states courts' constitutional function as independent adjudicatory systems.

A. The Value of Federalism in Aggregate Litigation

The Supreme Court has identified several justifications for its fidelity to federalism in other contexts. For example, it recognized the democratic advantages of local control, where state governments are in a position to be more responsive to their citizens' needs and "increase [the] opportunity for citizen involvement in democratic processes."[255] Additionally, the Court invoked the Jeffersonian view of states as experimental actors capable of innovative policy approaches that can be implemented on a small scale to test their efficacy without posing a risk that those efforts will have a significant impact beyond that state's borders if the experiment fails.[256] The Court also has perceived federalism's decentralization as promoting

254. 130 S. Ct. 1431 (2010) (plurality opinion).

255. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991); *see also* Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1324 (2003–04) (observing theories of federalism generally present in the case law).

256. *Gregory*, 501 U.S. at 458 ("This federalist structure . . . allows for more innovation and experimentation in government.").

fundamental liberties by avoiding the concentration of power in any one governmental actor.[257]

All of these federalism theories value states' autonomy because of the way that the exercise of that autonomy improves the process of governance. In this sense, the theories are neutral: they do not favor any particular type of policy making decisions within states, but rather they focus on the procedural benefits of having decentralized policy making generally. This means that states could be more generous in permitting class certification or more restrictive in prohibiting it—fidelity to federalism does not dictate an outcome, only a process of decision-making diffusion. Policy variations are, in fact, systemically desirable, reflecting experiments that may yet succeed or fail. These variations can also represent regional differences in values and social goals, bearing the imprint of local democratic processes.

This is not to say that there is no outer boundary to due process in state class actions. Indeed, *Hansberry* and *Mullane* both struck down state rules that violated procedural due process. We know that the notice boundary remains viable after *Jones*. *Shutts* also shed valuable light where that outer boundary line is located, outside the notice context.[258] The Court reversed Kansas's decision to apply its own law to a certified multi-state class, most of whose members lacked any discernible connection to Kansas. In applying *Allstate v. Hague*, the Court identified a flexible constitutional standard: the choice of law could not be "totally arbitrary or . . . fundamentally unfair."[259] In the context of choice of law, this meant that where the court deciding the class action had no connection to the suit, it could not apply its own law without violating the Constitution.[260] Nor could it create a "common question" to certify a class by arbitrarily applying the law of the forum.[261] The Constitution thus prohibited only a procedural choice that was "*arbitrary or unfair*" (based on unfair surprise).

Translating this to the certification problems currently plaguing lower courts, state class action procedures would undoubtedly violate due process if they were arbitrary and unfair. With the exception of *Philip Morris USA, Inc. v. Scott*, which involved a novel tort, all of the other cases discussed above in which certification was upheld, involved areas of law where class action procedure had long used statistical modeling and extrapolation. As Moller points out, evidentiary restrictions have been inherent in state and federal practice since the

257. *See id.*; Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1984); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 582 (O'Connor, J., dissenting).

258. Jones v. Shutts, 472 U.S. 797 (1985).

259. *Id.* at 818; see *id.* at 837 (Stevens, J., concurring).

260. *Id.* at 837 (Stevens, J., concurring).

261. *Id.* at 821.

Framing.[262] Defendants have a right to expect courts to follow their own states' laws in single-state classes; they do not have a right to rewrite those rules to put on individualized defenses in class actions where such devices traditionally allow class-wide or aggregate evidence.

B. The State Courts as Independent Systems in "Our Federalism"

Against this historical system of procedural diffusion in the United States, the defendant due process arguments in class actions call for a form of procedural "uniformism."[263] However, the uniformism being sought by defendants with regard to class certification is a most pernicious kind with regard to constitutional structure: it would eliminate state courts' ability to function as separate, distinct procedural bodies in complex litigation.

The independence of state courts in deciding questions of state law is a bedrock principle of American federalism. As the Supreme Court famously pronounced in *Younger v. Harris*:

> [A] proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism."[264]

Younger's expression of "Our Federalism" has particular salience for the mass tort litigation in state court because it captures the crucial balancing of "the legitimate interests of both State and National Governments [sic]."[265] These state interests have been overlooked so far in the policy debates about class action procedures.

The bedrock principle focusing on state functions and interests infuses a wide-swath federal abstention doctrine.[266] It also manifests in the venerable doctrine that forbids the Supreme Court from reviewing state court decisions resting on adequate state law grounds independent of federal questions.[267] Indeed, this prohibition is so powerful

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262. Moller, *supra* note 217, at 322.

263. I have criticized procedural "uniformism" elsewhere, in another context. *See* Margaret S. Thomas, *Constraining the Federal Rules of Civil Procedure Through the Federalism Canons of Statutory Interpretation*, 16 N.Y.U. J. LEG. & PUB. POL'Y 187, 223 (2013).

264. Younger v. Harris, 401 U.S. 37, 44 (1971).

265. *Id.*

266. *Id.* at 45–48.

267. Coleman v. Thompson, 501 U.S. 722, 729 (1991) ("This Court will not review a question of federal law decided by a state court if the decision of that court rests

that where a state court might have based a decision on a violation of the federal Constitution, or on an independent, adequate state law ground, the Court still must reject jurisdiction of the case so long as the independent state law ground is valid.[268] This form of constitutional avoidance in the Supreme Court's appellate jurisdiction emphasizes deference to state courts as independent adjudicatory systems. Similarly, the *Ashwander* constitutional avoidance canon reflects systemic respect for the independence of state courts in declining to pass on constitutional questions if some other non-constitutional ground can dispose of the case.[269] While none of these doctrines would prevent the Supreme Court from reviewing the constitutionality of class certification where no other ground could justify the state court result, the panoply of protective doctrine comprising "Our Federalism" has an important signaling function: the independence of state courts as separate adjudicatory bodies is structurally important and valuable.

As separate adjudicatory bodies, it is axiomatic that "[s]tates retain the authority under the Constitution to prescribe the rules and procedures that govern actions in their own tribunals."[270] In the class action context, where state claims are typically being adjudicated in state court, this means the states themselves define the features of aggregate litigation, and the procedural framework for it. Deviating from this default role ought to require a heavy showing by the defendants that the state procedure is arbitrary or unfair in the sense of *Allstate*, or incompatible with the pragmatic, flexible traditional view of procedural due process in the sense of *Hansberry* or *Mullane*,[271] or necessitated through the cost-benefit balance of *Mathews*.[272] This preserves an opportunity to notice, an opportunity to be heard and participate, and application of rules that are not arbitrary. It does not, however, require the states to entertain any particular form of evidence, proof, or damages model.

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on a state law ground that is independent of the federal question and adequate to support the judgment."); Klinger v. Missouri, 80 U.S. (13 Wall.) 257, 263 (1871).

268. *Klinger*, 80 U.S. at 263.

269. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (Brandeis, J., concurring).

270. Felder v. Casey, 487 U.S. 131, 137 (1988). Federal imposition of uniform procedures upon the states in civil litigation is normally possible only in very narrow circumstances under the so-called "reverse *Erie*" doctrine where those procedures are integral to a federal statutory right being adjudicated. *See* Dice v. Akron, Canton & Youngstown R. Co., 342 U.S. 359, 362–63 (1952) (holding that the right to jury trial was so substantial a part of the Federal Employers' Liability Act that the state court could not apply its own procedure to have a judge determine the question of fraudulent release); *accord* Byrd v. Blue Ridge Rural Elec. Co-op., Inc., 356 U.S. 525, 536 (interpreting *Dice* narrowly while recognizing that "[a] state may, of course distribute the functions of its judicial machinery as it sees fit").

271. *See supra* section III.A.

272. *See* note 232 and accompanying text.

A nationalized, homogenous class certification process based on the narrowest understanding of Federal Rule 23 is fundamentally at odds with this constitutional division of function. The aggressive expansion of procedural due process to accomplish that nationalization of procedure should thus be viewed with severe skepticism.

The flexible, pragmatic view of procedural due process that flows from *Hansberry* and *Mullane* through *Mathews* comports with "Our Federalism." Indeed, the values align with precision, by allowing states to adapt to changing factual, social, and economic inputs to develop procedural approaches that strike the right cost-benefit balance for local circumstances. That alignment is worth preserving in our constitutional structure.

V. CONCLUSION

Arguments attempting to constitutionalize class certification continue to develop in the lower federal courts and in the states. The U.S. Supreme Court has not yet taken up the call to create due process rights belonging to class action defendants in a way that would constrain state aggregate litigation procedures. The issue will almost certainly merit the Court's attention at some point soon.

Ultimately, the arguments favoring the due process right have little basis in precedent, history, or policy. The burden falls heavily on those advocating for procedural uniformism in class actions to justify the proposed intrusion into normal distributions of power among state and federal courts. Importantly, their arguments undermine fundamental federalism values regarding the integrity of state court systems as independent judicial systems with their own unique procedure. In so doing, they destroy the historical alignment between "Our Federalism" and procedural due process. At present, justification for such a realignment is lacking. Hopefully this Article may open the door to more fruitful discussion among scholars and courts about the interplay between federalism and arguments to constitutionalize class certification.